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No.

IN THE
Supreme Court of the United States
October Term, 1988

DEBORAH HANSON FULLER, Individually and as Provisional Tutrix of the Minor, Jay Brian Fuller,
Petitioner,

v.

UNITED STATES AIRCRAFT INSURANCE GROUP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether, having been admitted to the Union pursuant to treaty and organic act requirements that its constitution be consistent with the United States Constitution (including the Seventh Amendment), the State of Louisiana may subsequently amend the state constitution to provide for *de novo* appellate review of facts found by a jury in a civil case, contrary to the provisions of the Seventh Amendment.

2. Whether, in civil cases where the State of Louisiana has chosen to grant its citizens a trial by jury in accordance with the Seventh Amendment, a state appellate court may on appeal reverse the facts found by the jury and render a new judgment in accordance with its own findings based upon a *de novo* review of the record, instead of remanding the case for a new jury trial as required by the rules of common law.

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UNITED STATES AIRCRAFT INSURANCE GROUP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, SECOND CIRCUIT

The petitioner, Deborah Hanson Fuller, individually and as provisional tutrix of the minor, Jay Brian Fuller, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal, Second Circuit, State of Louisiana, entered in this proceeding on August 17, 1988.

OPINIONS BELOW

The opinion of the Court of Appeal, Second Circuit, State of Louisiana, is reported at 530 So.2d 1282, and is reprinted in the Appendix hereto, App. 3a, *infra*.

Denial of the Petition for Rehearing is unreported, but is reprinted in the Appendix hereto, App. 2a, *infra*.

Denial of the Petition for a Writ of Certiorari by the Louisiana Supreme Court has not yet been reported, but is reprinted in the Appendix hereto, App. 1a, *infra*.

JURISDICTION

The judgment and opinion of the Louisiana Court of Appeal, Second Circuit, were entered on August 17, 1988. (App. 3a, *infra)* A rehearing petition was denied on September 15, 1988. (App. 2a, *infra*.) On December 9, 1988, the Louisiana Supreme Court denied petitioner's timely Petition for a Writ of Certiorari. (App. 1a, *infra*) This Petition for Certiorari was filed within ninety (90) days of the latter date.

This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).

STATUTES INVOLVED

The following provisions from the treaties, organic acts, constitutions and statutes of the United States and the State of Louisiana have been printed in the Appendix:

Treaties with French Republic (App. 27a, *infra*):

Cession of Louisiana — Treaty of 1803; Article III

Organic Acts of Congress Respecting Admission of State of Louisiana (App. 28a, *infra*):

Act of Congress, March 26, 1804, c. 38, 2 U.S. Stat. 283, An Act erecting Louisiana into two territories, and providing for the temporary government thereof, Sec. 4 and Sec. 5 in pertinent part.

Act of Congress, March 3, 1805, c. 23, 2 U.S. Stat. 322, An Act further providing for the government of the territory of Orleans, Sec. 1 and Sec. 7 in pertinent part.

Act of Congress, February 20, 1811, c. 21, 2 U.S. Stat. 641, An Act to enable the people of the Territory of Orleans to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the other states, and for other purposes, Sec. 1 and Sec. 3 and Sec. 4 in pertinent part.

Act of Congress, April 8, 1812, c. 50, 2 U.S. Stat. 701, An Act for the admission of the state of Louisiana into the Union and to extend the laws of the United States to the said state, Sec. 1 and Sec. 3.

Constitutions of the State of Louisiana (App. 31a, *infra*):

Constitution of 1812, Article IV, Sec. 2.

Constitution of 1898, as amended by Acts 1906, No. 137, adopted November 6, 1906, Article 98.

Constitution of 1974, Article 5, Section 10 (B).

Constitution of the United States (App. 32a, *infra*):

Bill of Rights, Amendment VII.

Louisiana Code of Civil Procedure (App. 33a, *infra*):

Article 1731(A)

Article 1732

Article 1733 (A)

STATEMENT OF THE CASE

Deborah Hanson Fuller, the petitioner herein, brought this suit in the First Judicial District Court for the Parish of Caddo, State of Louisiana, individually and on behalf of her minor son, Jay Brian Fuller. The wrongful death action arises from

the May 28, 1981, crash of a 1980 Beech Bonanza A36TC aircraft owned by Blanco Oil Company. The crash resulted in the deaths of Douglas Gordon Fuller and the other three occupants of the airplane. Doug Fuller was survived by his three-month-old son, Jay Brian Fuller, and his wife, the petitioner, Deborah Hanson Fuller. Although suit was filed against numerous defendants, petitioner has disposed of her claims against all parties except respondent, United States Aircraft Insurance Group, who was the insurer both of the pilot of the airplane, Joe Bob White, and the oil company of which he was the president and owner, Blanco Oil Company.

The primary issue at trial and on appeal has been the independent contractor status of Doug Fuller. District Judge Stewart of the First Judicial District Court, Parish of Caddo, presided over the jury trial in this matter from April 6, 1987, through April 21, 1987. On the evening of April 21, 1987, the jury returned its verdict in the form of special interrogatories. After listening to two weeks of testimony, the jury unanimously determined that Doug Fuller was an independent contractor and awarded damages to petitioner. In accordance with their verdict, a judgment was signed on June 19, 1987, in favor of the petitioner and against United States Aircraft Insurance Group in the amount of $574,095.29 together with legal interest from March 1, 1982, until paid and all costs of these proceedings.

On July 17, 1987, a motion and order for suspensive appeal and sufficient bond were filed by respondent, United States Aircraft Insurance Group. In an opinion rendered on August 17, 1988, Judges Marvin, Norris and Lindsey of the Second Circuit Court of Appeal, State of Louisiana, reversed the judgment of the trial court and rendered judgment *de novo* dismissing petitioner's claims at her costs. In order to reach this determination, the Second Circuit found that the trial judge's charge

to the jury on the issue of independent contractor versus employee status was confusing and misleading and, therefore, technically inadequate. The Court stated that:

> The trial judge remarked that he rejected USAIG's proposed charge because it worded the factors in such a way that the jury might infer a preference on the court's part and that this encroached on the prohibition against commenting on the evidence. (citation omitted). The court's caution was well taken, but the pursuit of neutrality resulted in an instruction that is partly unclear and partly incorrect. It did not fairly and reasonably provide correct points of law to be applied to the issues and facts. (citation omitted) The court could have avoided this error by applying the logical and well-organized format of either of the proposed jury charges. (Opinion, p. 9, App. 13a-14a, *infra*)

This technical error in the jury instructions was solely attributable to the trial judge, since the jury charges submitted by both plaintiff and defendant would have been adequate.

After disregarding the factual findings of the jury, the Second Circuit conducted a trial *de novo* from the record of these proceedings. The Court held that because of the technical error in the jury instructions, the "manifestly erroneous" standard was inapplicable in the present case, and substituted its findings of fact for those of the jury. The Court stated:

> Under the usual standard of review, an appellate court should not disturb the factfinder's finding of fact, when the factfinder has made a reasonable evaluation of credibility and the evidence furnishes a reasonable basis for the finding, in the absence of manifest error. (citation omitted) However, when

> the jury instructions are misleading and unclear on a crucial issue, as in the instant case, the appellate court must review the evidence essentially *de novo*, making a fair determination based on the record evidence. (citation omitted) We conclude that the evidence contained in this record is sufficient to support a judgment under the correct legal principles, thus obviating the need for remand for a new trial. (Opinion, p. 10; App. 14a, *infra*)

Seizing the opportunity presented by a technical error in the jury charge, the Second Circuit found that they were not bound by the manifest error rule, and substituted their own findings of fact for those of the jury.

Among the reasons for rehearing[1], the petitioner claimed in paragraphs V and VI that:

"V.

> Where the Legislature has granted the citizens of Louisiana the right to a civil trial by jury, it is error for the Court of Appeal to deny that right and decide the plaintiffs' case on appeal as a trial '*de novo*.' "

"VI.

> The Court of Appeal erred in failing to grant the plaintiffs the right to a civil trial by jury as guaranteed to them under the . . . treaties and Acts of Congress of the United States of America which take precedence over provisions of the Louisiana Con-

[1]This federal question was necessarily raised for the first time in petitioner's application for rehearing. It was not an issue raised in respondent's appeal to the Court of Appeal. And it was not an issue that could have been anticipated or raised prior to the Court of Appeal decision re-examining the facts *de novo*.

stitution . . . ." Application for Rehearing, p. 4; See also Brief in Support of Application, pp. 29-41.

On September 15, 1988, the Court of Appeal denied the application for rehearing. The denial was not accompanied by a written opinion, and listed no reasons for the decision. (App. 2a, *infra*)

The petitioner renewed these contentions in seeking a Writ of Certiorari from the Supreme Court of Louisiana. In the fourth assignment of error, the petitioner contended that "where the legislature [had] granted citizens of Louisiana the right to a civil trial by jury, it [was] error for the Court of Appeal to deny that right by reversing and rendering judgment on appeal as a trial *de novo*, instead of remanding the case to the trial court." The fifth assignment of error in that application was the claim that by reversing the factual findings of the jury and rendering judgment on appeal as a trial *de novo*, the Court of Appeal had failed to grant petitioner "the right to a civil trial by jury as guaranteed to citizens of Louisiana under the treaties and Acts of Congress of the United States which take precedence over provisions of the Louisiana Constitution." Application for Writ of Certiorari, p. 9. Petitioner devoted at least six pages of the argument portion of the Application (pp. 42-48) to setting forth her claims as to that error and to giving reasons why the Louisiana Supreme Court should grant certiorari to review this constitutional issue of first impression. In opposing the Application, the respondent, United States Aircraft Insurance Group, devoted four pages opposing review of this fifth assignment of error. Opposition to Application for Writ of Certiorari, pp. 7-10.

The Supreme Court of Louisiana refused to issue the requested writ, stating simply that appellant's request was "Denied." (App. 1a, *infra*)

REASONS FOR GRANTING THE WRIT

The Seventh Amendment provides that in suits at common law "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Although the State of Louisiana was accepted into the Union on condition that its own system of civil justice not be inconsistent with the principles of the Constitution of the United States, including the Seventh Amendment, it has breached that condition. Louisiana has provided in its Constitution for *de novo* appellate re-examination of facts found by civil juries — in accordance not with "the rules of the common law," but with the French civil law tradition.

This case is a vehicle for testing Louisiana's right to break its promises, both to its inhabitants and to the Union, to adhere to the Seventh Amendment principle respecting appellate review of jury fact findings. There are compelling reasons why this Court should review this matter.

I

The Decision Below Raises Important And Unique Questions As To Louisiana's Obligation To Maintain A Civil Justice System Not Inconsistent With The Seventh Amendment.

This case involves critical and unique questions arising out of Louisiana's admission to the Union in 1812, a time when the Seventh Amendment was an integral part of the United States Constitution. Did Louisiana, in achieving statehood in accordance with the relevant treaties and organic acts of Congress, promise its inhabitants and the Union of which it became a member that its state constitution and laws would at no time be inconsistent with the civil jury trial principles embodied in

the Seventh Amendment? Can Louisiana break such a commitment and create a civil jury trial system in the mold of the French civil law tradition? Do the Constitution, treaties and laws of the United States permit one state only — Louisiana — to provide for *de novo* appellate fact-finding in the context of a civil jury trial proceeding?

This Court has never addressed those questions. True, it has held that the states, and Louisiana in particular, are not directly subject to the Seventh Amendment's guarantee of a jury trial in civil actions. As was said in *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876), "the States, so far as this Amendment is concerned, are left to regulate [civil] trials in their own way." To the same effect is this Court's summary affirmation of the three-judge court ruling in *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972), *aff'd* 409 U.S. 943 and 1098 (1972).

But those cases do not purport to address or resolve the questions posed here. The Fourteenth Amendment does not compel Louisiana to incorporate the Seventh Amendment limitation of appellate re-examination of facts to those areas permitted by "the rules of the common law" into its own system of justice. However, the fact that this Seventh Amendment principle may not be so fundamental to an ordered scheme of liberty as to be incorporated by the Fourteenth Amendment is no answer to the problems raised in this petition. What of a state like Louisiana which, as a condition of its acceptance into the Union, has voluntarily promised to abide by the principles of the Seventh Amendment? No other state in the Union has ignored the principles of the Seventh Amendment in establishing a civil justice system.

The importance and substantiality of the problem is obvious from an account of the treaty and statutory events leading to Louisiana's admission to the Union in 1812.

In April, 1803, the President of the United States of America and the First Consul of the French Republic entered into a treaty in Paris by which the Province of Louisiana was to be ceded to the United States. This treaty was ratified in Washington, D.C., on October 21, 1803. Article III of that treaty provided that the inhabitants of the Province of Louisiana "shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States . . . ." Cession of Louisiana, Treaty of 1803, Article III. (App. 27a, *infra*) It will be remembered that the Federal Constitution was adopted in 1787; and the first ten amendments to that Constitution were ratified only four years later in 1791. At the time the United States entered into the Treaty of 1803 with France, the Seventh Amendment, guaranteeing the right to civil trial by jury and prohibiting the re-examination of any facts found by a jury, was an integral part of the Federal Constitution.

By Act of Congress dated March 26, 1804, the Province of Louisiana was divided into two territories, and a temporary government was formed. That act provided in Section 4 that no law would be valid in the newly formed territories which was inconsistent with the Constitution and laws of the United States. It further provided for trial by jury in all cases, both civil and criminal, if either of the parties required it. 2 U.S. Stat. 283 § 5. This was confirmed by Act of Congress, March 3, 1805, which established the territorial government of Orleans and provided that the new Territory of Orleans should establish a government in all respects similar to that established in the Mississippi Territory, and that the inhabitants of the Territory of Orleans should be entitled to and enjoy all the rights, privileges and advantages enjoyed by the people of the Mississippi Territory. The people of the Mississippi Territory

enjoyed the right to trial by jury in civil actions. The act further established that the inhabitants of Orleans were authorized to form a constitution and state government. The only restrictions upon that government were that the constitution should be republican and that it should not be inconsistent with the Constitution of the United States. At that time, the Seventh Amendment to the Constitution provided for civil trial by jury, and prohibited the re-examination of any facts found by a jury. (See App. 28a-29a, *infra*)

On February 20, 1811, an Act of Congress was passed authorizing the people of the Territory of Orleans to form a constitution and state government in anticipation of admission of the state into the Union. This enabling act again required that the constitution to be formed should be republican and consistent with the Constitution of the United States. Pursuant to the Enabling Act of 1811, the Territory of Orleans formulated a constitution which was submitted to Congress for approval in 1812. There was no reference to civil jury trials in that constitution, and the only reference to appellate jurisdiction was contained in Article 4, Section 2, providing that the Supreme Court should have appellate jurisdiction only and that its jurisdiction should extend to all civil cases where the matter in dispute exceeded the sum of $300.00. (App. 31a, *infra*) Although the Constitution as submitted to Congress did not contain all of the rights guaranteed by the United States Constitution and Bill of Rights, it could not be said to be inconsistent with the Constitution of the United States and was, therefore, approved. There was no mention of appellate review of facts in the Louisiana Constitution as approved by Congress in 1812. (App. 29a, *infra*)

After approval of the Constitution of 1812, an Act of Congress was passed on April 8, 1812, by which the State of Louisiana was admitted into the Union. It was provided in the Act of Admission that all terms and conditions contained in the third

section of the Enabling Act were considered fundamental conditions and terms upon which the State of Louisiana was incorporated into the Union. Section 3 of the Enabling Act had provided in part that the Constitution to be formed by the State of Louisiana should be consistent with the Constitution of the United States. It was further provided in Section 3 of the Act of Admission that the judge of the Supreme Court in the State of Louisiana should have the same jurisdiction and powers which were given to the District Judge of the Territory of Orleans. No judge within the Territory of Orleans had the power to review facts found by a jury. (See App. 29a-30a, *infra*)

It was not until 1906, almost 100 years later, that the Constitution of the State of Louisiana was amended to provide for appellate review of facts. (App. 31a, *infra*) This provision was inconsistent with the Seventh Amendment to the Constitution of the United States. It also violated the Enabling Act and the Act of Admission whereby the Territory of Louisiana became the State of Louisiana. When Louisiana was ceded to the United States by treaty with France, its inhabitants were promised admission into the Union in accordance with the principles of the Federal Constitution. When Louisiana became a territory, its inhabitants were expressly promised the right to trial by jury. Act of Congress March 26, 1804, c. 38, 2 U.S. Stat. 283. When Louisiana sought statehood, its inhabitants were promised a state constitution consistent in all respects with the Federal Constitution. The citizens of the resulting State of Louisiana have been seeking unsuccessfully to secure these rights for themselves ever since, and now ask this Court to enforce the jury trial promises contained in the treaties and Acts of Congress by which Louisiana became a state.

This Court has held that where there is a conflict between a treaty and the provisions of a state constitution or of a state statute, the treaty will control. *Zschernig v. Miller*, 389 U.S.

429, (1968); *Baker v. Carr*, 369 U.S. 186, (1962). The same is true of an Act of Congress. U.S. Const. Art. VI. If treaties and Acts of Congress of the United States are the supreme law of the land, and if they supersede prior and subsequent state constitutional and statutory provisions, there should be no question that the citizens of the State of Louisiana are guaranteeed the right to trial by jury. The issue presented by this case is not whether the right to a meaningful trial by jury is fundamental to a system of ordered liberty, but rather whether the treaties and Acts of Congress by which Louisiana became a state are superior to a subsequent and inconsistent state constitutional provision.

The answer to that issue does not depend upon how fundamental or significant may be the right to a jury trial in a civil tort action. The critical point is that this jury trial right, along with many others, was promised to the citizens of the newly founded State of Louisiana. To allow the State Legislature almost 100 years later to circumvent this promise by constitutionally adopting appellate review of facts, a provision blatantly inconsistent with the Seventh Amendment to the United States Constitution, would be to undermine the lasting efficacy of this nation's treaty-making power. For if the citizens of the sovereign states making up this nation may not call upon the United States government to enforce its promises given to those citizens both in treaties and Acts of Congress, how can the citizens of foreign governments be expected to treat our promises with respect?

II.

The Decision Below Raises A Critical Problem Concerning Whether Appellate Re-examination Of Jury-Found Facts, In A Manner Contrary To Common Law Rules, Abrogates The Seventh Amendment Right To A Jury Trial.

The Seventh Amendment provides in part that "no fact found by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The rules of the common law require that "questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative." *Walker v. New Mexico & S.P.R. Co.*, 165 U.S. 593, 596 (1897). The rules of the common law do not permit an appellate court to conduct a *de novo* review of a civil jury trial and render judgment based upon its own findings of fact instead of the jury's. The basic question here presented is whether those common-law rules are so integrated with the Seventh Amendment's "right of trial by jury," that a violation of those rules effectively abrogates the right of trial by jury.

This Court has held that when the verdict of the jury is based upon the failure of the trial court to direct a verdict for the defendant, a new trial must be awarded. The appellate court is not permitted under the Seventh Amendment to direct that a judgment be entered on appeal which is contrary to the jury verdict, even though that practice may be authorized by state statute. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1912). In discussing the Seventh Amendment prohibition of re-examination of facts by an appellate court, this Court has stated:

> This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other

> manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings. *Parsons v Bedford,* 3 Pet. 433, 7 L.Ed. 732 (1830) at 447, 448.

When an error of law affecting the validity of a jury verdict is committed by the trial court, the only remedy permitted by the Seventh Amendment is remand of the case to the trial court for a new trial. See also *United States v. Wonson,* 1 Gall. 5, 20 Fed. Cas. No. 16,750 (1812); *Capital Traction Co. v. Hof,* 174 U.S. 1 (1899).

In the present case, the Court of Appeal below has not only reversed the findings of the jury, but has entered judgment in accordance with its own findings of fact based upon a *de novo* review of the record. The court justified its review of the facts found by the jury by holding that there was an error in the jury instructions, stating that "a verdict based on instructions that were faulty in a critical regard need not be bound by the manifest error rule." (Opinion, p. 5; App. 8a, *infra*) The jury instructions were declared to be defective, not because they contained any error of law, but because they were considered by the court to be "unclear." (Opinion, p. 9; App. 13a, *infra*). Once the court had determined that the jury instruction was unclear, it found that the way was open for its *de novo* review of the facts:

> Under the usual standard of review, an appellate court should not disturb the factfinder's finding of fact when the factfinder has made a reasonable evaluation of credibility and the evidence furnishes a reasonable basis for the finding, in the absence of manifest error. (citation omitted) However, when

> the jury instructions are misleading and unclear on a crucial issue, as in the instant case, the appellate court must review the evidence essentially *de novo*, making a fair determination based on the record evidence. (citations omitted) We conclude that the evidence contained in this record is sufficient to support a judgment under the correct legal principles, thus obviating the need for remand for a new trial. (Opinion, p. 10; App. 14a, *infra*)

The court devoted over ten (10) pages of its opinion to an exhaustive review of the evidence presented in the trial court. This type of re-examination of facts found by a jury would not be permitted under the rules of common law as incorporated into the Seventh Amendment.

The court did not find that the jury's verdict was manifestly erroneous, nor did it note any egregious or manifest error in the proceedings in the trial court. The reasons announced by the court for its reversal of the jury's findings are contrary to every principle protected by the Seventh Amendment.

It has already been firmly established that no state may be compelled under the Fourteenth Amendment to grant its citizens a Seventh Amendment right to civil jury trial. The protections afforded to the fact-finding process by the Seventh Amendment are, therefore, not binding upon Louisiana's state courts through the Fourteenth Amendment. However, Louisiana has chosen to grant its citizens the right to request a Seventh Amendment civil trial by jury when the amount in dispute exceeds $20,000.00, exclusive of interest and costs. (La. Code of Civ. Proc. arts. 1731, 1732, App. 33a, *infra*) Although not contained in the Louisiana Constitution of 1812, this right was suggested by the Livingston Committee in 1823 and incorporated into the Louisiana Code of Practice of 1825. The Supreme Court of the State of Louisiana has held the right

to civil trial by jury to be absolute where it has been legislatively granted, and where all requirements of the Code of Practice have been met. *Parish v. Holland,* 166 La. 24, 116 So. 580 (1928).

The right to civil jury trial had been afforded equal dignity in earlier Louisiana cases. In 1825, the Louisiana Supreme Court held that where testimony was erroneously allowed to come before a jury, the case must be remanded for a new trial. *Bowman v. Flowers,* 2 Mart. (n.s.) 267 (La. 1825). In that case the court stated:

> It has been strongly urged on us, that even rejecting this evidence, there is still enough on the record to enable us to affirm the verdict. This position brings directly before us the question, whether, in cases of this kind, which are emphatically proper to be tried by a jury of the vicinage, this court can, with propriety, take on it to decide the cause on other evidence, than that, on which the jury passed. The weight, which is properly attached to a verdict in such cases seems to forbid us doing so. The plaintiff had a right to demand, and did in fact, pray for a jury in the court below, and he had of course, a right that they should pass on his case on legal evidence alone, so that he might have the benefit, when his cause came here, of that presumption in his favor, which a verdict would have created. It follows then, that if the chance to obtain this advantage has been taken from him, by the act of the opposite party, or the error of the judge, he has a right to have his cause tried again. 2 Mart. (n.s.) at 272.

Thus, the court was able to give effect not only to the doctrine of appellate review of facts, but also to the legislatively recognized right to jury trial.

Prior to the decision in this case, there would have been little doubt that findings of fact made by a trial court could not be disturbed on appeal unless deemed "manifestly erroneous" by the appellate court. *Comment*, 21 La. L. Rev. 402 (1961). This was true of both jury and non-jury cases, and stems, not from any particular respect for the verdict of a civil jury, but rather from the deference which is to be paid to the findings of any trier of fact who has had the opportunity to judge the credibility of witnesses first-hand. It has been stated that "(a)t its inception, the manifest error rule was intended to operate as a limitation upon the freedom with which the factual determinations of a trial court could be overturned . . . ." Lobrano, *Civil Procedure-Remand-Right to a Jury Trial*, 41 Tul. L. Rev. 922, 922 (1967). In formulating the manifest error rule, the courts of the State of Louisiana struck a delicate balance between the uniquely civilian doctrine of appellate review of facts and the sanctity of trial court findings of fact.

This delicate balance becomes crucial, however, when a jury trial is demanded and granted under Louisiana Code of Civil Procedure Articles 1731-1733. Judge Wisdom, speaking for a federal three-judge district court, has stated that:

> The law of this state is unique. Nevertheless, its lawmakers, legislative and judicial, have managed to work out compromise procedures compatible with Louisiana's civilian heritage and with the Anglo-American concept of due process. There is appellate review on the facts as well as on the law, but it is subject to the requirement that factual findings of a trial court or the verdict of a jury should be disturbed only when they are manifestly erroneous. *Melancon*, 345 F. Supp. at 1047.

It is apparent that the *Melancon* decision was strongly influenced by what that court perceived to be a balancing of civil law

doctrine and personal liberties. That balance no longer exists. If Louisiana courts are allowed to reverse the factual findings of a civil jury when a technical error is made by the judge, and render judgment *de novo* giving no weight whatsoever to the jury's findings of fact, then the civil jury trial in Louisiana has become, in Judge Wisdom's words, no more than an expensive "exercise in futility." *Melancon*, 345 F. Supp. at 1028.

The question presented by this case is not whether the Due Process Clause of the Fourteenth Amendment requires the State of Louisiana to grant its citizens the right to civil trial by jury. That question was rendered moot in 1825 when the Louisiana Legislature adopted the Seventh Amendment's right to trial by jury in its original Code of Practice. This petition requests this Court to determine what sanctity, if any, must be given to the findings of fact made by a legislatively-authorized Seventh Amendment jury.

The question presented is not limited to the denial of this petitioner's rights. It has far-reaching implications and sets a dangerous precedent for the courts of every state. Where the citizens of a state through their elected legislative officials have appropriated for themselves certain constitutional rights and liberties, may those rights be judicially circumvented and abolished?

The issue presented is crucial because of its subtlety. The State of Louisiana has not repealed the right to civil jury trial. Such a direct attack upon the freedom of its citizens would raise cries of protest across the state. Instead, the courts of this state have been allowed to abolish the protections afforded to litigants by the civil jury trial under the guise of appellate review of facts. This Court must be wary whenever such subtle attacks are launched against those freedoms protected by our Bill of Rights.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 8, 1989

APPENDIX

The Supreme Court of the State of Louisiana

DEBORAH HANSON FULLER, INDIVIDUALLY
AND AS PROVISIONAL TUTRIX OF THE MINOR,
JAY BRIAN FULLER

VS. NO. 88-C - 2537

UNITED STATES AIRCRAFT INSURANCE
GROUP AND CHICAGO INSURANCE COMPANY

IN RE: Fuller, Deborah Hanson; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Second Circuit, Number 19805-CA; Parish of Caddo 1st Judicial District Court Div. "D" Number 285-611

00000000

December 9, 1988

Denied.

JAD
WFM
JLD
JCW
HTL
LFC

Supreme Court of Louisiana
December 9, 1988

/s/ Frans J. Labranche Jr.
Clerk of Court
For the Court

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, La. 71101
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To: Sydney Nelson, Esq.
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Shreveport, Louisiana: September 15, 1988

Docket Numer: 19805-CA

Fuller, Deborah

vs.

United States

BEFORE JUDGES: HALL, MARVIN, SEXTON, NORRIS, LINDSAY,

As counsel of record in the captioned case, you are hereby notified that the application for rehearing filed by Plaintiff/ Appellee has this day been DENIED.

FOR THE COURT
Diana P. Heisler
Clerk of Court

cc: Dermot McGlinchey Esq
J.W. Jones Esq.
Frank Walker Jr. Esq.

No. 19,805-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * * * * *

DEBORAH HANSON FULLER, Individually and as Provisional Tutrix of the Minor, JAY BRIAN FULLER — Plaintiff/Appellee

versus

UNITED STATES AIRCRAFT INSURANCE GROUP and — Defendant/Appellant

CHICAGO INSURANCE COMPANY — Defendant/Appellee

* * * * * * * *

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana

Honorable Carl E. Stewart, Judge

* * * * * * * *

NELSON, HAMMONS & JOHNSON
by: Sydney B. Nelson — Attorneys for Plaintiff/Appellee

McGLINCHEY, STAFFORD, MINTZ, CELLINI & LANG
by: Kenneth H. LaBorde — Attorneys for Defendant/Appellant United States Aircraft Insurance Group

BODENHEIMER, JONES, KLOTZ & SIMMONS
by: J.W. Jones — Attorneys for Defendant/Appellee Chicago Insurance Company

LUNN, IRION, JOHNSON,
SALLEY & CARLISLE
by: Frank M. Walker, Jr.

Attorneys for
Intervenor
Commercial Union
Insurance Company

* * * * * *

Before MARVIN, NORRIS and LINDSAY, JJ.

NORRIS, Judge

This is a suit for wrongful death resulting from the crash of a private Beech Bonanza A36TC airplane. The plaintiff's decedent, Doug Fuller, was a passenger in Blanco Oil Company's plane that crashed shortly after takeoff on May 28, 1981. The litigation encompassed many parties and incidental actions, but by the time the case went to the jury after a long trial, the only remaining defendants were Blanco Oil's primary insurer, United States Aircraft Insurance Group (''USAIG''), and its umbrella insurer, Chicago Insurance Company (''Chicago''). The jury rendered verdict in favor of the plaintiff and assessed 57% of the fault to the defendants' insured, Blanco Oil, and Blanco's president, Mr. Joe Bob White. The jury set damages slightly in excess of $1,000,000, including $400,000 and $200,000 to Mrs. Fuller and her minor son respectively for loss of support. After rendition of verdict but before entry of judgment, the claims against Chicago were settled, leaving only USAIG cast for White's and Blanco's portion of the damages. USAIG has appealed, and Mrs. Fuller has answered the appeal, raising the following issues:

(1) Was the jury clearly wrong in finding that Mr. Fuller was an independent contractor for, rather than an employee of, White or Blanco?

(2) Was the trial court's jury charge as to distinguishing between an independent contractor and an employee unclear? and

(3) Was the award of $600,000 for loss of support inadequate?

Concluding that USAIG's arguments have merit, we reverse and render.

FACTS

In the late 1970s Joe Bob White, an oil man of long standing, started a number of companies in the petroleum business. His oil development company, White & Bancroft, was in the business of exploring for oil and drilling wells. Blanco Oil was established to operate and manage the completed wells. Banjo Inc. was to provide oilfield services. These entities were closely allied and were practically White's alter ego. Most of their activities were in a field near Haynesville. Although White was quite knowledgeable about the oil patch, he was not himself a petroleum engineer.

In early 1980 White announced he would be hiring his "close friend," Doug Fuller, as petroleum engineer. White had known Fuller for several years, since Fuller had been in college and engaged to White's daughter's roommate. White apparently agreed to hire Fuller after he completed his term in the air force in 1980. Several witnesses testified that Fuller, the younger man, looked to White as a "second father." Starting in February 1980, Fuller worked, without a written contract, for White's companies in Shreveport and at the Haynesville field, and for no one else. Mrs. Fuller testified that White's enterprises kept her husband very busy during this time. White paid Fuller a specified semimonthly sum (at the time of his death it was $1,500 twice a month) with no withholdings for income taxes or FICA. He also did not pay unemployment tax for Fuller. Fuller filed tax returns as a self-employed professional person, submitting quarterly estimates for income tax and self-employment tax.

In most other respects, however, the arrangement appeared to be a typical employment relation. White provided Fuller with office space, supplies and secretarial help without requiring reimbursement. He also provided free of charge a car, auto insurance and gas company credit card. White even carrried Fuller on Blanco's hospitalization plan and provided him life insurance at no charge. At the same time White was also carrying several employees of an unrelated company, Lu-Chem, on Blanco's hospitalization plan, but this was for the latter's convenience and with the clear understanding that Lu-Chem was to repay White in the future. The premiums were in fact repaid. Fuller put in regular hours and worked very closely with White. As to the nature of Fuller's work, Blanco's secretary-treasurer, Mr. Ferguson, testified that although Fuller's work was result-oriented, White retained the primary responsibility and authority as to what was done and when. R.p. 1896.

In early 1981, Fuller's actual father, an operations manager for Gulf Oil, gave Fuller a lead on some subleases in Midland, Texas, that Gulf was about to let. Fuller passed on this information to White; it represented a potentially profitable expansion that they wanted to explore. Blanco bought a used Beech A36TC to facilitate travel. White was a certified pilot but had not flown in over three years, except for a biennial recertification session with flight instructor Gene Rosa a few days before the fatal crash. Fuller was also a certified pilot, having flown a KC135 in the air force, but he never flew Blanco's Beechcraft. On May 28, 1981, White and Fuller boarded the plane to fly to Midland. Apparently White was the pilot and Fuller was in the front; Blanco's rig superintendent and his wife, Mr. and Mrs. McDonald, were passengers in the rear. They took off from Shreveport downtown airport, Runway 23, at 8:32 that morning.

Shortly after takeoff the pilot radioed the tower that his cockpit door was open and he needed to land the craft. Permission was granted to return to Runway 23 and the airplane began a turnaround maneuver that appeared somewhat irregular to the air traffic controllers, who radioed him that he could return to either Runway 23 or Runway 14. Two or three times they advised him to watch his altitude. The plane stalled at about 500 feet and crashed in a field one-half mile northwest of the airport, killing all the occupants.

Mrs. Fuller brought suit individually and on behalf of her minor son, Jay Fuller, who was only a few months old at the time of the accident. As noted, she sued USAIG and Chicago, the insurers of Blanco and Joe Bob White. She also sued Beech Aircraft Company, alleging the company had known for years that its cockpit doors did not close satisfactorily, thus creating a hazard especially at takeoff; and Gene Rosa's insurer, Employers Casualty Company, alleging that Rosa's recertification flight did not adequately address emergency procedures. There were numerous incidental demands, notably the intervention of Commercial Union, Blanco's workers comp carrier; Mrs. Fuller had brought a separate suit against Commercial Union in the event her husband was determined to have been Blanco's employee. As noted, all claims were settled except the principal demand against USAIG and Chicago, reducing the issues to Fuller's status as an employee or independent contractor; the allocation of fault, if any, to White and Fuller; and quantum.

The jury found that Fuller was an independent contractor for Blanco and therefore not confined to the exclusive remedy of workers compensation. The jury allocated fault as follows:

Joe Bob White	57%
Gene Rosa	27

Beech Aircraft	16
Doug Fuller	0

The jury set damages at $1,000,000, including $600,000 for loss of support and $400,00 for loss of love and affection. Funeral expenses were also awarded.

Chicago settled with Mrs. Fuller before the verdict was reduced to judgment. The court rendered judgment against USAIG for $570,000 plus 57% of funeral expenses. From this judgment USAIG has appealed and Mrs. Fuller has answered the appeal.

JURY INSTRUCTIONS

By its second assignment USAIG contends the trial court failed to explain the significance of the various factors to be weighed by the jury in deciding whether Fuller was an employee or an independent contractor. Fuller's status was the most important issue at trial and any deficiency in the instructions, according to USAIG, would mandate setting aside the verdict. We have considered this assignment first because of the effect of erroneous instructions on the standard of review; a verdict based on instructions that were faulty in a critical regard need not be bound by the manifest error rule. *Laborde v. Velsicol Chem. Corp.*, 474 So.2d 1320 (La. App. 3d Cir. 1985), writ denied 480 So. 2d 738 (La. 1986).

Adequate jury instructions are those that fairly and reasonably point up the issues and provide correct principles of law for the jury to apply to those issues. *Sparacello v. Andrews*, 501 So.2d 269 (La. App. 1st Cir. 1986), writ denied 502 So.2d 103 (La. 1987); *Laborde v. Velsicol Chem. Corp ., supra; Lincecum v. Missouri Pacific R. Co.*, 452 So.2d 1182 (La. App. 1st Cir. 1984), writ denied 458 So.2d 476 (La. 1984). The trial judge is not required to give the precise instructions

submitted by the litigants; he need only give instructions that properly reflect the applicable law and adequately convey the issues to the jury LSA-C.C.P. art. 1792; *Schoonmaker v. Capital Towing Co.*, 512 So.2d 480 (La. App. 1st Cir. 1987), writ denied 514 So.2d 458 (La. 1987); *Marler v.Rent-It Co.*, 490 So.2d 784 (La. App. 3d Cir. 1986). Even if the requested instructions are fair statements of the law, the trial judge need not include them verbatim but must strike a fair balance so that no one issue is unduly emphasized. *Wilson v. Aetna Cas. & Sur.Co.*, 401 So.2d 500 (La. App. 2d Cir. 1981); *Folse v. Fakouri*, 371 So.2d 1120 (La. 1979).

USAIG argues the trial judge's charge did not precisely instruct the jury how to weigh its findings and properly apply them to reach the correct legal conclusion. USAIG's proposed jury charge No. 15 begins by instructing the jury to balance eleven listed factors which bear on the degree of control that White had the right to exercise over Fuller. Each factor contains a statement that would support a finding of employee status but begins with the conjunction "whether," to indicate alternative conditions. For instance, the second factor reads, "Whether the services performed by Fuller were an integral part of Blanco Oil Company's business." Each of the factors is similarly phrased. The instruction then advises that an affirmative finding weighs in favor of an employment relationship, and finally notes the jury should consider the total economic relationship between the parties.

The plaintiff's proposed jury charge is similar to USAIG's. It lists eight factors and each is followed by a long explanation of the precise manner of weighing the evidence. For instance, the seventh factor is entitled "Nature of the Business" and reads as follows:

7. *Nature of the Business*

> If you find that the nature of the business or occupation of the person performing the services is independent of the nature of the principal's business, an independent contractor/principal relation is indicated.

As noted, each of the factors carries a similar explanatory instruction.

By contrast, the court's actual charge does not provide a point-by-point recitation of how each factor should be weighed, even though the parties either submitted this type of explanation or a general instruction that clarified the weighing. The court's charge begins by quoting LSA-R.S. 23:1021 to say that a contractor renders service for a specified price or a specified result under control of the principal as to results only and not as to means. It further states that each case must be decided on its own particular facts. This fairly and reasonably states the law. *Sones v. Mutual of Omaha Ins. Co.*, 272 So.2d 739 (La. App. 2d Cir. 1973), writ denied 273 So.2d 292 (La. 1973); *Amyx v. Henry & Hall*, 227 La. 364, 79 So.2d 483 (1955).

However, when the instruction addresses how to weigh the factors, it becomes unclear. There is a general instruction which states:

> It is not necessary that all of these elements be present in every case to render a person who performs service for another an independent contractor; nor is the absence of any element to be considered decisive. You are to consider the overall relationship between the parties, and the elements listed above are intended to give you guidance in that respect only.

The very first factor shows the difficulty. It reads:

> (1) The degree of control exercised by the principal over the work performed.

The "degree of control" is obviously a sliding scale; the greater the control, the more likely an employment relation. "Control" is not an element that is either present or absent; it is present to a greater or lesser degree. If a great degree of control is present, however, then this would not render the worker an independent contractor, as the general instruction would suggest. We are constrained to conclude that the trial court's first factor is not clearly stated to conform to the general instruction, and even if it could be clarified by the jury, it would imply the wrong conclusion.

The same kind of confusion riddles the other factors as well. Factor No. 4 refers to:

> (4) The manner in which the worker is carried on the payroll of the principal.

The "manner" of payment is like the "degree" of control; it is neither present nor absent. The phrasing of the factor does not correspond to the general instruction, and offers no guidance whatsoever as to the weighing of the evidence. Factor No. 6, referring to the "source of the materials used by the worker," suffers from the same lack of clarity.

Even more disturbing, however, is the erroneous implication provided by Factors Nos. 7 and 8. They provide as follows:

> (7) Whether the worker performing the services is an integral part of the principal's business or whether he is independent of the principal's business.

(8) Whether a person performs work for a principal on a continuing and exclusive basis.

The *positive* assertion of these factors is that a worker is performing services integral to the principal's business and that he is performing work on a continuing and exclusive basis. The general instruction indicates that if these factors are present, a finding of independent contractor is justified. This conclusion is plainly wrong. Performing work that is an integral part of the principal's business is indicative of employment status. *Durant v. Industrial Lumber Co.*, 6 So.2d 164 (La. App. 1st Cir. 1946); cf. LSA-R.S. 23:1035. Likewise, performing work for the principal on a continuing and exclusive basis is indicative of employment. *Sones*, supra, *Malone & Johnson*, 13 La. Civil Law Treatise (Workers' Compensation) § 74 (1980, with 1987 p.p.).

We have reviewed the remainder of the factors to see if perhaps all of them were simply stated backwards, making assertions that implied employee status. However, Factors Nos. 3 and 5 provide:

(3) Whether the worker renders service for a specified price to be paid for a specified result either as a unit or as a whole.

(5) The right by the worker, whether exercised or not, to hire helpers and assistants.

In both instances, the positive assertions (that work is done for a specified price per unit or whole, and the worker has the right to hire helpers) are indicative of an independent contractor situation. LSA-R.S. 23:1021(6); Malone & Johnson, *op. cit.*, § 79. Thus the presence of these factors would substantiate a finding of the contractor relationship, as the general instruction suggests.

In summary, the manner in which the factors are stated creates considerable confusion as to the proper assessment of the evidence. Some of them apply directly; some of them do not conform to the general provisions; and some squarely lead to the wrong conclusion. In this state of affairs, we could not reasonably hold the instructions "adequate" on this most crucial aspect of the case.

We realize that factors as such are subordinate to the overall consideration of the "total economic relationship" of the parties. We are reluctant to hold jury instructions inadequate. However, given the sparsity of evidence as to the exact nature of White and Fuller's relationship, the individual factors must assume a greater significance. We cannot avoid the conclusion that they were unclear enough on the critical issue to mislead the jury.

We would also note an omission from the trial court's charge. USAIG requested instructions as to the fringe benefits that Fuller received from White. The evidence showed that these benefits were considerable and were a significant element of the "overall economic relationship" between the parties. *Sones*, supra. The trial court declined to give this instruction. The instructions should encompass the applicable facts. *Lincecum v. Missouri Pacific R.Co.*, supra; *Reeder v. Allstate Ins. Co.*, 235 So.2d 111 (La. App. 4th Cir. 1970), writ denied 256 La. 615, 237 So.2d 397 (1970); *Miller v. Fogleman Truck Lines*, 398 So.2d 634 (La. App. 3d Cir. 1981), writ denied 401 So.2d 358 (La. 1981). We feel the instructions should have conformed to this significant aspect of the case.

The trial judge remarked that he rejected USAIG's proposed charge because it worded the factors in such a way that the jury might infer a preference on the court's part and that this encroached on the prohibition against commenting on the

evidence. LSA-C.C.P. art. 1791; R.p.p. 193 1940. The court's caution was well taken, but the pursuit of neutrality resulted in an instruction that is partly unclear and partly incorrect. It did not fairly and reasonably provide correct points of law to be applied to the issues and facts. *Laborde v. Velsicol Chem. Corp.*, supra. The court could have avoided this error by applying the logical and well-organized format of either of the proposed jury charges. This assignment of error has merit. We have therefore examined the evidence under the appropriate legal standard to determine whether it proves an employee or independent contractor status.

CONTRACTOR STATUS

By its first assignment of error, USAIG contends the preponderance of evidence adduced at trial clearly established that Fuller was an employee of Blanco or White, and thus the evidence does not support the jury's verdict of contractor status. USAIG characterizes the evidence in favor of employee status as "overwhelming."

Under the usual standard of review, an appellate court should not disturb the factfinder's finding of fact, when the factfinder has made a reasonable evaluation of credibility and the evidence furnishes a reasonable basis for the finding, in the absence of manifest error. *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973). However, when the jury instructions are misleading and unclear on a crucial issue, as in the instant case, the appellate court must review the evidence essentially *de novo*, making a fair determination based on the record evidence. *Lincecum v. Missouri Pacific R. Co.*, supra; *Laborde v. Velsicol Chem. Corp.*, supra. We conclude that the evidence contained in this record is sufficient to support a judgment under the correct legal principles, thus obviating the need for remand for a new trial.

The primary source of law is the workers compensation statute, which defines an independent contractor as:

> any person who renders service, other than manual labor, for specified recompense for a specified result, either as a unit or as a whole, under the control of his principal as to the results of his work only, and not as to the means by which such result is accomplished. LSA-R.S. 23:1021(6).

The statute further provides:

> A person rendering service for another in any trades, businesses or occupations covered by this Chapter is presumed to be an employee under this chapter. * * * LSA-R.S. 23:1044.

We acknowledge dicta in two cases to suggest that when an injured worker files suit alleging contractor status, a different presumption might perhaps apply. *Allgood v. Loeb,* 22 So.2d 568 (Orl. Cir. 1946), rev'd 210 La. 594, 27 So.2d 380 (1946); *Sones v. Mutual of Omaha,* supra. One noted commentator disagrees, stating that even if the claimant asserts he is a contractor, he must apparently overcome the statutory burden. Malone & Johnson, *op. cit.,* § 85; see also *Maurice v. Orleans Parish Sch. Bd.,* 295 So.2d 184 (La. App. 4th Cir. 1974). Given the humanitarian objective of the statute to cover as many workers as possible, and the compromise of relinquishing the tort remedy for claimants, we are inclined to apply R.S. 23:1044 to this case, in accord with Prof. Johnson's analysis.

The term "independent contractor" connotes a freedom of action and choice with respect to the undertaking in question as well as a legal responsibility on the part of the contractor in case the agreement is not fulfilled in accord with its

covenants. *Hickman v. Southern Pac. Transp. Co.*, 262 La. 102, 262 So.2d 385 (1972). The inquiry to determine whether a relationship is that of independent contractor or of employment hinges on a principal test: the control over the work reserved by the principal. The amount of supervision and control actually exercised is not the crucial question, but rather the amount of supervision and control reserved by the principal from the nature of the relationship. *Amyx v. Henry & Hall,* supra. Each case must be decided on its own facts, taking into special consideration the *total economic relationship* between the parties. *Sones v. Mutual of Omaha,* supra; *Shepherd v. Martin,* 448 So.2d 223 (La. App. 1st Cir. 1984).

As a guide to analyzing the evidence in particular cases, this court has taken into account various factors that weigh either against or in favor of an employment relationship. *Sones,* supra, 272 So.2d at 742. At trial of the instant case, the parties both submitted a list of factors synthesized from *Sones* and from *Hickman,* supra, and *Amyx,* supra. The trial court adopted eight of these suggested factors, to which appellant objected not because they were inapplicable but because they were incomplete and lacked adequate explanation. Appellant's objections were meritorious, as already discussed, but for the sake of convenience we have adapted the trial court's listing of factors to our discussion, making the necessary changes and additions to show how each one bears on the critical issue of control.

The salient features of the total economic picture include the fact that Fuller performed valuable professional services for White, and these services were an important part of White's business; although White could not ultimately dictate the means of Fuller's work, he had total authority to assign and direct work; he appeared to work very closely with Fuller; there was no written contract but there was a definite payment scheme; Fuller was almost totally financially dependent

on White, who apparently had the right to discontinue Fuller's services without notice; and Fuller worked exclusively for White for 16 months, from early 1980 until the accident. This overview would suggest that White retained significant control over Fuller in the business enterprise.

The proof in this case was difficult because both of the people involved were obviously unavailable to offer their perceptions of the relationship or to describe accurately how they transacted business together. We feel this dearth of evidence underscores the importance of the factors, which we have analyzed as follows:

1. The degree of supervision and control actually exercised by the principal over the work performed. As already noted, this factor is highly indicative of reserved control. *Sones v. Mutual of Omaha,* supra; *Hemphill v. State Farm Ins. Co.,* 472 So.2d 320 (La. App. 3d Cir. 1985). In accord with R.S. 23:1021, courts have held that control over the end result, without the right of supervising the manner in which the work is perfomed, is suggestive of an independent contractor relationship. *Lushute v. Diesi,* 354 So.2d 179 (La. 1977); *Kamm v. Morgan,* 157 So.2d 118 (La. App. 4th Cir. 1963).

Mr. Ferguson testified that everyone in Blanco's "close knit operation" looked primarily to White for supervision or guidance in his job duties and that White had "primary responsibility" over the work. R.p. 1896. While Mr. Ferguson once described Fuller's work as "result oriented," R.p.1910, this was not the thrust of his testimony. A passage cited by appellants in brief underscores the ambiguity.[1] Ms.McMullen

1. Q. Were there ever occasions when you heard Mr. White ask Mr. Fuller to take care of some task?

   A. Usually he had a lot of discretion as to what needed to be done and when. Now, sometimes, yes, he would suggest to Doug that certain things needed to be done and Doug would proceed forthwith. R.p. 1896.

testified that White usually knew what Fuller was doing and that Fuller would have done whatever White wanted him to do. R.p. 903. By seeking to know the whereabouts and doings of Fuller so constantly, White was almost certainly endeavoring to exercise a considerable degree of control over him. As a successful entrepreneur, White appeared to keep close tabs on everyone in his organization.

In sum, Mr. Ferguson's testimony on this point was somewhat equivocal but viewed together with the overall picture of the relationship as described by Mrs. Fuller and Ms. McMullen, the whole must support a finding of employee status.

2. Whether the work undertaken can be discontinued or terminated at any time by either party and without a corresponding liability for its breach. The right to terminate a worker's services at will is indicative of economic control on the principal's part and is antagonistic to the independent nature of the contractor's business. *Hickman v. Southern Pac. Transp. Co.*, supra, 262 So.2d at 391. The principal's arbitrary decision to dishonor an existing contract would expose him to liability for breach of contract. See A. Larson, *Workmen's Compensation*, desk ed. § 44.35 (1985). An employer's arbitrary decision to fire an employee would be without major consequence, except perhaps for unemployment compensation. LSA-R.S.23:1601

The testimony on this factor was fairly clear. Ms. McMullen testified that White could have released Fuller at any time and that Fuller could have left. R.p. 912. Mr. Ferguson testified likewise, noting that Fuller, unlike himself, did not have a written contract declaring that he would be self-employed. R.p. 1910. Mrs. Fuller testified that her husband could not have just "upped and left," because this would violate both his moral obligation to White and her impression of their verbal agree-

ment. However, she stated otherwise in a deposition prior to trial. R.p.p. 1580, 1581. She never offered any other details of this alleged agreement, and she made no statement as to White's right to terminate Fuller. On the whole, this evidence leads us to conclude that White and Fuller's arrangement was terminable at will. Mrs. Fuller's single remark as to her husband's obligation to White is easily outweighed by the other testimony and supports a finding of employment status.

3. Whether the worker renders service for a specified price to be paid for a specified result either as a unit or a whole. R.S. 23:1021(6). To support independent contractor status, the contract must call for a specific piecework as a unit to be done according to the contractor's own methods, at a specified price and for a specified time. *Amyx v. Henry & Hall,* supra, 79 So.2d at 486. Payment on a time basis is a strong indication of the status of employment, whereas payment on a completed project basis is indicative of independent contractor status. Larson, *op. cit.* § 44.33. There was no documentation of any agreement for a specific undertaking as a unit or a whole, or for any specific amount of work to be performed together, and no invoices claiming payment for a specified period of time. According to Mr. Ferguson, Fuller never did a specific parcel of work, but rather performed both office duties and field duties, depending on "what we had going on at the time." R.p. 1903, 1895. There was nothing to rebut the documentary evidence and direct testimony that Fuller was being paid on a regular time basis to perform whatever tasks White directed in the furtherance of the business. This factor supports a finding of employee status.

4. The manner in which the worker is carried on the payroll of the principal. If the worker is carried on the principal's payroll as an employee, then an employment relationship is indicated. White paid Fuller from his personal account, or from

the Blanco Special Account, under entries labeled "Engineering Services" or "Professional Fees." White did not withhold federal or state income tax and did not pay FICA or unemployment tax for Fuller. Standing alone, this would not disprove employee status. See *Suhor v. Medina*, 421 So.2d 271 (La. App. 4th Cir. 1982). However, Fuller's own records corresponded with White's payment scheme. He submitted quarterly returns based on estimated tax and paid self-employment tax, listing petroleum engineering as his business. If Fuller had considered himself an employee, he probably would have requested White to give him the benefit of the lower FICA rate and the freedom from quarterly payments. Fuller would not have assumed the added expense and inconvenience unless he thought it reflected their business relationship. Admittedly, the payroll arrangement could be explained by saying that White did not need the business deductions. R.p. 1899. In *Sones*, supra, the plaintiff's decedent was paid similarly to Fuller and was nevertheless determined to be an employee. However, on the whole, this factor weighs in favor of independent contractor status.

5. The right of the worker, whether exercised or not, to hire helpers and assistants. No evidence was produced as to the right to hire, although Fuller unquestionably did not hire any and appeared to use Blanco's and White's staff. Since he did not contract for a specific job at a specific price, we question whether he could have hired anyone on the pay he was receiving.

6. The source of the materials and equipment to be used by the worker. When the principal provides valuable equipment, the relationship is usually one of employment. *Hickman v. Southern Pac. Transp. Co.*, supra, 262 So.2d at 390; Larson, *op. cit.*, § 44.34. The evidence showed that White provided Fuller with a car and auto insurance, just like the plain-

tiff in *Hickman*, who was determined to be an employee. Moreover, White provided office space in American Bank Tower without charge, as well as secretarial and clerical assistance. R.p.p. 901, 902. Most of Fuller's business expenses were either advanced or reimbursed by White. This evidence overwhelmingly shows that Fuller was merely using White's means of production, as an employee typically does.

The appellees introduced Fuller's 1980 Schedule C income tax return, showing a small deduction for office supplies. Fuller's accountant, Mr. Thomas, explained that many of the deductions usually taken by businessmen were simply not applicable to Fuller because he had been in business only a short time and did not yet have a staff or major expenses. R.p. 853. However, the majority of Fuller's expenses were reimbursed by White or Blanco in the fashion of ordinary employment. R.p. 1901. We are also constrained to note that the 1980 Schedule C was filed *after* the tragic accident, when litigation may have been anticipated. The overall weight of the evidence shows convincingly that White supplied the material, equipment, supplies and clerical help used by Fuller. This factor supports a finding of employee status.

7. Whether the worker performing the services is an integral part of the principal's business or whether he is independent of the principal's business. Independent contractor status presupposes the independent nature of the worker's business and is not exclusive as to the means whereby it is accomplished. *Amyx v. Henry & Hall,* supra, 79 So. 2d at 486. Ms. McMullen, testifying for appellee, conceded that Fuller's services were "vital" to the business, R.p. 903, and Mr. Ferguson, testifying for USAIG, called them "essential." R.p. 1894. In fact Mr. Ferguson specifically referred to Fuller's services as a "part of the business." In light of this testimony,

it would be specious to say that White could not have directed Fuller in regard to the particulars of the operation. *Amyx v. Henry & Hall,* supra, 79 So.2d at 487. We must reject appellee's contention in brief that Fuller's work was "independent of and separate from" Blanco's business.

Appellee has stressed Fuller's specialized, technical training as indicative of his independence from White's enterprise. We agree that a professional person is more likely than a laborer or a clerical worker to serve as an independent contractor. However, a professional person's status is not automatically ascertained. See *Ducote v. Albert,* 503 So.2d 85 (La. App. 5th Cir. 1987). aff'd 521 So.2d 399 (La. 1988), holding that summary judgment is not a proper vehicle for determining a company doctor's status. In affirming *Ducote,* the supreme court plainly stated that a company doctor or plant physician is not an independent contractor for all purposes as regards the workers comp law. 521 So.2d at 400. Rather, the circumstances of the case are determinative. See also *Suhor v. Medina,* supra. The evidence plainly shows that Fuller's services as a petroleum engineer were both essential to and a part of White's petroleum business, and thus subject to the latter's control.

Appellee further argues that White engaged a number of professional people, such as the C.P.A., Mr. Thomas, for technical services essential to the business. Mr. Thomas, however, maintained an independent business entity, separate offices and his own staff. Fuller did not. The fact that White hired other people who would appear to be independent contractors does not alter the predominant evidence that Fuller was an employee. The evidence bearing on this factor supports a finding of employee status.

8. Whether a person performs work for a principal on a continuing and exclusive basis. In *Sones,* supra, this court attached

"particular significance" to the fact that the plaintiff's decedent rendered services to the defendant on a continuing and exclusive basis; this evidence was strong enough to overcome many indicia of contractor status because it suggested the worker's dependence on the principal. Simply put, a person who performs services for one principal across an extended period of time is more likely to be an employee. The evidence is not disputed that Fuller worked exclusively and continuously for White from the beginning of 1980 until his death. Mrs. Fuller testified that White's projects kept her husband quite busy and that he had not yet found the time to set up an office or business with other clients, though he intended to do so. However, the 16-month history between White and Fuller provides nothing else on which to base this conclusion. Appellees argue the alleged "new business venture" involving the Midland field is evidence of Fuller's independence and his incipient contracting business.[2] We do not agree. It appears that when Fuller received information about the leases in Midland, he immediately involved White. This indicates he needed White's support and viewed him as an employer. White allowed Fuller to purchase a considerably larger interest in a Midland well than in any of the Haynesville projects, but this is probably a reflection of the help that Fuller's father rendered in securing the leases, and is not different from Fuller's proprietary holdings in previous wells. This factor clearly supports a finding of employee status.

Several other points were developed at trial. The first of these is one we feel the court should have incorporated into

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[2]Appellee cites as further evidence of Fuller's "new" status the "fact" that in early 1981, he began receiving paychecks monthly instead of semimonthly. Br., 31. This assertion is not supported by the evidence. Exhibit P-5 shows continued semimonthly checks throughout 1981.

the jury charge. It involved "perks" not directly connected with production, such as insurance coverage. Mr. Herrington, an insurance agent, testified that he included Fuller's salary in calculating the original premium estimate on Blanco's workers comp policy. Fuller's name did not appear on the final audit, which was prepared after the tragic accident. Carrying someone on a workers comp insurance policy is not an admission of employee status. *Allgood v. Loeb*, 210 La. 594, 27 So.2d 380 (1946).

The life and hospitalization insurance received by Fuller free of charge are much more persuasive of employment status. It seems elementary that the purpose of hiring contractors is to escape the costs of employee expenses; in fact, the compensation law usually tries to circumvent loopholes that would allow employers to evade their comp obligations. See LSA-R.S. 23:1061. By providing such lavish fringe benefits, White showed a willingness to assume employee costs that can only be equated with the perception that he was in an employment relation. We feel this is a valid consideration in the overall economic relationship between Fuller and White, and it strongly supports a finding of employee status.

Finally, there were two documents, a financial statement and a pilot record, on which Fuller listed himself as Blanco's employee. Standing alone, neither of these would be especially probative, but they were prepared under circumstances where Fuller would have had no motive to misstate his true status, and they correspond with the overwhelming weight of the evidence to show that Fuller perceived himself an employee of Blanco Oil.

In sum, all but one of the factors clearly support a finding of employee status. The evidence indicates a relationship of almost total economic dependence. As this court pointed out in *Sones*, such a finding equates with a substantial right of con-

trol on White's part. This degree of control is incompatible with the independence that is the hallmark of an independent contractor. Even though there was no direct evidence that White directed Fuller as to detail every day, the testimony bearing on the factors is so strong that it mandates a finding of employment status. The evidence is considerably stronger than in *Sones*. Given the overwhelming nature of the evidence, even under the standard of manifest error, we would be constrained to hold the verdict plainly wrong. And given the inadequacy of the jury instructions, we conclude *a fortiori* that the evidence preponderated to show that Doug Fuller was an employee of Joe Bob White.

We have also considered the evidence of the fast friendship and nearly filial relation between Fuller and White, questioning whether White's generosity might be more reflective of friendship and a desire to lend a helping hand than of desire to establish an employment relationship. Under the circumstances of the case, White's paternalistic leanings could probably explain one or two aberrant findings, such as providing office space and supplies for someone who was really an independent contractor. However, we are unable to stretch this speculative theory to counteract the wide array of facts that militate so inevitably in favor of employment. To do so would require us to disregard the plain impact of the overwhelming weight of evidence.

The evidence also shows, with remarkable clarity, that at the time of the accident, Fuller was an employee functioning in the course and scope of his employment with White, and the accident arose out of the course and scope of employment. LSA-R.S. 23:1031. The tragic plane flight was undertaken in pursuit of White's new project at the Midland field; from all appearances Fuller was to work for him there in a manner similar to his work at Haynesville field. Fuller was exposed

to the risk of the flight because of his employment for White. See *Kern v. Southport Mill*, 174 La. 432, 141 So. 19 (La. 1932). The time and place of the flight were obviously contemplated by White. *Whitney v. United States Fid. & Guar. Co.*, 373 So.2d 728 (La. App. 2d Cir. 1979), writ denied 376 So.2d 320 (La. 1979). Appellee's claims are subject to the exclusive remedies of the Workers Compensation statute, for which USAIG is not liable under its policy.

Because of our conclusion as to liability, we need not discuss the issue of quantum raised by appellee in her answer to appeal.

CONCLUSION

For the reasons expressed, the judgment of the trial court is reversed. Douglas Fuller was an employee of Joe Bob White and the accident arose out of, and during the course and scope of his employment for White. Appellee's remedy lies exclusively in workers compensation. Judgment is hereby rendered dismissing plaintiff's claims at her costs.

REVERSED AND RENDERED.

TREATIES WITH THE FRENCH REPUBLIC

Cession of Louisiana - Treaty of 1803

Article III

The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages, and immunities, of citizens of the United States; and, in the mean time, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

ORGANIC ACTS OF CONGRESS RESPECTING ADMISSION OF STATE OF LOUSIAINA

Territories of Louisiana and Orleans, Act of Congress March 26, 1804, c. 38, 2 U.S. Stat. 283

Sec. 4. . . . Their legislative powers shall also extend to all the rightful subjects of legislation; but no law shall be valid which is inconsistent with the constitution and laws of the United States . . . .

Sec. 5. . . . In all cases, criminal and civil, in the superior court, the trial shall be by a jury, if either of the parties require it . . . .

Territorial Government of New Orleans - 1805, Act of Congress March 3, 1805

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he is hereby, authorized to establish within the territory of Orleans a government in all respects similar (except as is herein otherwise provided) to that now exercised in the Mississippi territory . . . and that from and after the establishment of the said government, the inhabitants of the territory of Orleans shall be entitled to and enjoy all the rights, privileges, and advantages secured by the said ordinance, and now enjoyed by the people of the Mississippi territory.

. . . . . .

Sec. 7. And be it further enacted, That whenever it shall be ascertained by an actual census or enumeration of the inhabitants of the territory of Orleans, taken by proper authority, that the number of free inhabitants included therein shall

amount to sixty thousand, they shall thereupon be authorized to form for themselves a constitution and state government . . . Provided, That the constitution so to be established shall be republican, and not inconsistent with the constitution of the United States, nor inconsistent with the ordinance of the late Congress, passed the thirteenth day of July, one thousand seven hundred and eighty-seven, so far as the same is made applicable to the territorial government hereby authorized to be established . . . .

Enabling Act,
Act of Congress Feb. 20, 1811

Sec. 3. And be it further enacted, That the members of the convention, when duly elected, be, and they are hereby, authorized to meet at the city of New Orleans, on the first Monday of November next, which convention, when met, shall first determine, by a majority of the whole number elected, whether it be expedient or not, at that time, to form a constitution and state government for the people within the said territory . . . whereupon the said convention shall be, and hereby is, authorized to form a constitution and state government for the people of the said territory; Provided, The constitution to be formed, in virtue of the authority herein given, shall be republican, and consistent with the constitution of the United States . . . .

Admission of the State of Louisiana
Act of Congress April 8, 1812

Whereas the representatives of the people of all that part of the territory or country ceded, under the name of "Louisiana," by the treaty made at Paris on the thirtieth day of April, one thousand eight hundred and three, between the United States and France . . . did, on the twenty-second day of January, one thousand eight hundred and twelve, form for

themselves a constitution and state government, and give to the said state the name of the state of Louisiana in pursuance of an act of Congress entitled "An act to enable the people of the territory of Orleans to form a constitution and state government, and for the admission of the said state into the Union on an equal footing with the original states, and for other purposes;" and the said constitution having been transmitted to Congress, and by them being hereby approved: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the said state shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever, by the name and title of the state of Louisiana; Provided That . . . the conditions and terms contained in the third section of the act, the title whereof is hereinbefore recited, shall be considered, deemed, and taken fundamental conditions and terms, upon which the said state is incorporated in the Union.

. . . . . .

Sec. 3. And be it further enacted . . . there shall be established in the said district a district court, to consist of one judge, who shall reside therein, and be called the district judge . . . . The said judge shall, in all things, have and exercise the same jurisdiction and powers which, by the act the title whereof is in this section recited, were given to the district judge of the territory of Orleans . . . .

CONSTITUTIONS OF THE STATE OF LOUISIANA

Constitution of 1812

Article IV

CONCERNING THE JUDICIARY DEPARTMENT

§ 2. The supreme court shall have appellate jurisdiction only, which jurisdiction shall extend to all civil cases when the matter in dispute shall exceed the sum of three hundred dollars.

Constitution of 1898

COURTS OF APPEAL

Art. 98. [As amended Acts 1906, No. 137, adopted Nov. 6, 1906]. The Courts of Appeal, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases, civil and probate, when the matter in dispute or the fund to be distributed shall exceed one hundred dollars, exclusive of interest, and shall not exceed two thousand dollars, exclusive of interest, and such appeal shall be upon the law and the facts.

Constitution of 1974

Article V

§ 10. Courts of Appeal; Jurisdiction

Section 10. (B) Scope of Review. Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts. In criminal cases its appellate jurisdiction extends only to questions of law.

CONSTITUTION OF THE UNITED STATES

Amendment [VII.]

Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

LOUISIANA CODE OF CIVIL PROCEDURE

CHAPTER 7. JURY TRIAL

Art. 1731. Issues triable by jury

A. Except as limited by Article 1732, the right of trial by jury is recognized.

. . . . . .

Art. 1732. Limitation upon jury trials

A trial by jury shall not be available in:

(1) A suit where the amount in dispute does not exceed twenty thousand dollars exclusive of interest and costs.

(2) A suit on an unconditional obligation to pay a specific sum of money, unless the defense thereto is forgery, fraud, error, want or failure of consideration.

(3) A summary, executory, probate, partition, mandamus, habeas corpus, quo warranto, injunction, concursus, worker's compensation, emancipation, tutorship, interdiction, curatorship, legitimacy, filiation, separation from bed and board, annulment of marriage, or divorce proceeding.

(4) A proceeding to determine custody, visitation, alimony, or child support.

(5) A proceeding to review an action by an administrative or municipal body.

(6) All cases where a jury trial is specifically denied by law.

Amended by Acts 1983, No. 534, § 1; Acts 1984, No. 301, § 1; Acts 1987, No. 766, § 1.

Art. 1733. Demand for jury trial; bond for costs

A. A party may obtain a trial by jury by filing a pleading demanding a trial by jury and a bond in the amount and withi the time set by the court pursuant to Article 1734.

. . . . . .

SUPREME COURT, U.S.
FILED
APR 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1472

(2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

DEBORAH HANSON FULLER, Individually and as Provisional Tutrix of the Minor, Jay Brian Fuller,
Petitioner,

v.

UNITED STATES AIRCRAFT INSURANCE GROUP,
Respondent.

On Petition for Writ of Certiorari to the Louisiana Court of Appeal, Second Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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37P

QUESTION PRESENTED

Whether this Court should disturb a ruling of a Louisiana appellate court, which properly construed and applied Louisiana law to the facts before it in the record, using a standard of appellate review of facts mandated by the Louisiana Constitution, practice, and procedure for well over one hundred years, and further, one which has been uniformly upheld by this Court and the Louisiana Supreme Court as consistent with the federal Constitution.

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

The following is a list of parent companies, subsidiaries and affiliates of respondent United States Aircraft Insurance Group:

United States Aviation Underwriters, Inc.

General Reinsurance Company

The Aetna Casualty & Surety Company

Aetna Insurance Company

Continental Casualty Company

Employers Insurance of Wausau A Mutual Company

Hartford Fire Insurance Company

Liberty Mutual Insurance Company

Maryland Casualty Company

Reliance Insurance Company

Royal Indemnity Company

St. Paul Fire & Marine Insurance Company

The Travelers Indemnity Company

United States Fidelity & Guaranty Company

Zurich Insurance Company

State Farm Fire & Casualty Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1472

DEBORAH HANSON FULLER, Individually and as Provisional Tutrix of the Minor, Jay Brian Fuller,
Petitioner,

v.

UNITED STATES AIRCRAFT INSURANCE GROUP,
Respondent.

On Petition for Writ of Certiorari to the Louisiana Court of Appeal, Second Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The respondent, United States Aircraft Insurance Group, respectfully prays that this Court deny the petition for writ of certiorari, seeking review of the Louisiana Court of Appeal, Second Circuit's opinion in this case. That opinion is reported at 520 So. 2d 1282, and is reprinted in Petitioner's Appendix at 3a-26a.

Denial of the Petition for a Writ of Certiorari by the Louisiana Supreme Court, reprinted in Petitioner's Appendix at 2a, is now reported at 534 So.2d 444-45.

STATUTES INVOLVED

In addition to the provisions from the treaties, constitutions and statutes of the United States and the State

of Louisiana set forth in Petitioner's Appendix, the following provisions have been printed in Respondent's Appendix:

Constitutions of the State of Louisiana (App. at 2a, *infra*):

Constitution of 1812, Art. IV, Sec. 11; Art. VI, Sec. 11.

Constitution of 1845, Art. 63.

Constitution of 1852, Title V, Art. 62.

Constitution of 1864, Title V, Art. 70.

Constitution of 1868, Title IV, Art. 74.

Constitution of 1879, Art. 81.

Constitution of 1898, Art. 85; Art. 98 (as amended by Acts 1906, No. 137, adopted November 6, 1906).

Constitution of 1913, Art. 85; Art. 98.

Constitution of 1921, Sec. 10; Sec. 29.

Constitution of 1974, Sec. 5; Sec. 10.

Louisiana Civil Code (App. at 7a *infra*)

Article 2164

Constitution of the United States, Art. II, § 2 (App. at 5a *infra*)

STATEMENT OF THE CASE

This tort action for wrongful death was initiated by petitioner Deborah Hanson Fuller, individually and on behalf of her minor offspring in the First Judicial District Court for the Parish of Caddo, State of Louisiana. The decedent, Doug Fuller, was a passenger in a plane owned by Blanco Oil Company, when it crashed on May 28, 1981.

Petitioner chose not to request a trial by jury in the complaint. Instead, respondent United States Aircraft Insurance Group ("USAIG") asked for a jury trial in its answer, and paid the statutory costs associated therewith, pursuant to state law.

Prior to trial, all but two of the defendants settled with petitioner, leaving only Blanco Oil Company's primary insurer, respondent USAIG and its umbrella insurer, Chicago Insurance Company. At trial, the most critical issue involved the decedent's status as an independent contractor or employee of Blanco Oil Company. If the latter, then petitioner's exclusive remedy lay under the Louisiana Workers Compensation statute for which USAIG concededly was not liable under its policy.

Both petitioner and respondent submitted proposed jury charges on this issue, detailing the numerous factors comprising this evaluation under state law and the manner in which the evidence must be weighed with respect to each. The trial court accepted neither proposed charge, but formulated and gave its own instruction on this matter. The jury rendered a verdict in favor of petitioner and assessed damages in excess of $1,000,000, casting 57% of the fault to respondent's insured.

Respondent USAIG appealed the jury's verdict to the Louisiana Court of Appeal for the Second Circuit. Among the errors assigned were the following:

(1) Was the jury clearly wrong in finding that Mr. Fuller was an independent contractor for, rather than an employee of, White or Blanco?

(2) Was the trial court's jury charge as to distinguishing between an independent contractor and an employee unclear?

Petitioner's App. at 4a.

Concluding that these assignments of error were meritorious, the appellate court reversed the jury's verdict and rendered judgment in favor of respondent. *Id.* at 5a.

Regarding the challenged jury instruction, the appellate court concluded that:

> the manner in which the factors are stated creates considerable confusion as to the proper assessment

> of the evidence. Some of them apply directly; some of them do not conform to the general provisions; and some squarely lead to the wrong conclusion. In this state of affairs, we could not reasonably hold the instructions "adequate" on this most crucial aspect of the case.

Id. at 13a.

Turning its attention to the evidence in the record before it, the appellate court examined that evidence under the legal standard mandated by Louisiana constitutional, statutory and jurisprudential law to determine whether the decedent was an employee or independent contractor. After a detailed and exhaustive review of the evidence, the court concluded that the jury's verdict was manifestly erroneous, or clearly wrong, and held that the evidence, *a fortiori*, preponderated in favor of respondent. In so holding, the court observed that all but one of the factors clearly supported a finding of employee status, indicating a relationship of "almost total economic dependence." *Id.* at 24a. Significantly, it went even further, finding as follows:

> Given the overwhelming nature of the evidence, even under the standard of manifest error, we would be constrained to hold the verdict plainly wrong. And given the inadequacy of the jury instructions, we conclude *a fortiori* that the evidence preponderated to show that Doug Fuller was an employee . . . .

Id. at 25a.

Petitioner sought a rehearing, contending for the first time that the appellate court's rendering of judgment in favor of respondent deprived petitioner of her right to a jury trial, even though the record is clear that petitioner neither wanted nor requested one in the first instance. Petitioner's application for rehearing was denied, as was the subsequent application for writ of certiorari with the Louisiana Supreme Court. This petition for a writ of certiorari followed.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS COURT HAS CONSISTENTLY HELD THAT THE SEVENTH AMENDMENT RIGHT TO JURY TRIAL IN CIVIL CASES HAS NO APPLICATION TO STATE COURT PROCEEDINGS

Petitioner asks this Court in the first of its two questions presented to reconsider a question which has long been laid to rest, that is, whether the United States Constitution guarantees to its citizens the Seventh Amendment trial by jury in state court civil proceedings, including the prohibition against review of facts found by that jury. This Court's answer to that question has been an unconditional and unqualified "No." Thus foreclosed from arguing that the federal Constitution guarantees Seventh Amendment rights, petitioner has constructed a clever variant of that argument: federal treaty and statutory law, not the federal Constitution, guarantees to petitioner the Seventh Amendment rights.

Respondent submits that, if the federal Constitution, the supreme law of this land, does not extend the reach of the Seventh Amendment to state court civil proceedings, then *a fortiori*, a federal treaty or statute, which requires only that a state adopt laws consistent with the federal Constitution, should not be construed to do so either.

It has long been settled by this Court that the United States Constitution was ordained and established by the people of the United States for their own federal government and not for the government of the individual states, each of which established its own constitution with such restrictions on state power as it deemed appropriate. Where particular terms of the Constitution are intended to restrict state government, Chief Justice John Marshall explained in *Barron v. The Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833) that "[t]he question of their application to States is not left to construction . . . [but] . . . is averred in positive words. *Id.* at

249. Enacted in 1791 against a backdrop of fear that federal power would be abused, the Amendments to the Constitution were designed to guard against unwanted encroachment of the federal, not state, government. *Id.* at 250. Based on the foregoing principles, Justice Marshall held that the Amendments to the Constitution, which contain no express indication that they are to apply to State governments, cannot in fact be so applied. *Id. Accord Twitchell v. The Commonwealth of Pennsylvania*, 74 U.S. (7 Wall.) 321 (1869); *Fox v. State of Ohio*, 46 U.S. (5 How.) 410 (1847) (Amendments not designed as limits upon state governments, but are exclusively restrictions upon federal power intended to prevent interference with rights of states and their citizens).

The Seventh Amendment proved no exception to the general rule that the Amendments have no application whatsoever to the states. This Court has held many times that that Amendment relates only to trials in the federal courts. *E.g. Bute v. People of the State of Illinois*, 333 U.S. 640, 657 (1947); *Edwards v. Elliot*, 88 U.S. (21 Wall.) 532 (1874). Insofar as the Seventh Amendment is concerned, the states "are left to regulate trials in their own courts in their own way", *Walker v. Sauvinet*, 92 U.S. 678, 679 (1876), including the right to modify or even abolish jury trials altogether. *Olesen v. Trust Company of Chicago*, 245 F.2d 522 (7th Cir. 1957), *cert. denied*, 355 U.S. 896 (1957); *Melancon v. McKeithen*, 345 F.Supp. 1025, 1043-44 (E.D.La. 1972), *aff'd*, 409 U.S. 943 and 1098 (1972). As this Court observed in *Bowman v. Lewis*, 101 U.S. 465, 466 (1880):

> [T]here is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. . . . .
>
> Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by

> jury, and on the other no such right. Each State prescribes its own modes of judicial procedure.

Not even the subsequent enactment of the Fourteenth Amendment in 1868, which this Court has selectively construed to apply to State governments certain fundamental rights contained in other Amendments, effected any change in the law on the subject of jury trials in civil suits in state court. *Walker v. Sauvinet*, 92 U.S. 678 (1876). In *Walker*, this Court held that trial by jury in state courts is not a privilege or immunity of national citizenship which states are forbidden by the Fourteenth Amendment to abridge. *Compare Duncan v. Louisiana*, 391 U.S. 145 (1968) (in criminal cases, Sixth Amendment right to jury trial is constitutionally guaranteed in state courts).

Pursuant to its rightful authority, the State of Louisiana, drawing from both the civilian heritage which forms the foundation of its laws, and the English/American common law, created a judicial system of its own, incorporating trial by jury in civil cases (although the federal Constitution did not so require) and appellate review of fact and law. Contrary to petitioner's intimations, this judicial system has been entrenched in Louisiana from its inception as a State in 1812 through the long-established practice of its courts. *E.g. Abat v. Doliole*, 4 Mart. (O.S.) 316 (1816). Appellate review of facts was subsequently incorporated implicitly in Louisiana's constitutions and, beginning in 1879, expressly carried forward in those constitutions. H. McMahon, *The Louisiana Code of Civil Procedure*, 21 La. L. Rev. 1, 13 & n.34 (1960).

The thrust of petitioner's contention appears to be that, although the federal Constitution does not apply the Seventh Amendment to the States, petitioner is nevertheless entitled to application of that Amendment by virtue of federal treaty and acts of Congress. Petitioner would have this Court believe that the State of Louisiana has

wrongfully deprived its citizens of the benefits of certain "promises" contained in those federal enactments to the Seventh Amendment trial by jury.

Respondent submits that invocation of federal law in this respect is entirely misplaced, first because the citizens of Louisiana are themselves responsible for formulating the laws of the State and, second, because the State of Louisiana has fully complied with applicable federal law.

The citizens of Louisiana have exactly the judicial system they want; if they did not, appropriate avenues of redress have always been available to them. As Chief Justice Marshall observed long ago in *Barron*, wherein petitioner sought to invoke the federal Constitution against state legislative action:

> Had the people of the several States, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments, the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented State, and the required improvements would have been made by itself.

32 U.S. at 249-150.

The citizens of Louisiana have expressed no desire to be hidebound by the proscriptions of the Seventh Amendment, but are content with a judicial system which has operated smoothly and successfully for over 100 years. Indeed, at the constitutional convention in 1973, an attempt to rescind the authority of appellate courts to review factual findings was soundly defeated. *Gonzales v. Xerox Corp.*, 320 So.2d 163, n.1 (La. 1975).

In any event, the State of Louisiana has comported fully with the relevant federal treaty and acts of Congress upon which petitioner so heavily relies.

II. BECAUSE APPELLATE REVIEW OF FACT UNDER THE LOUISIANA STATE CONSTITUTION IS NOT INCONSISTENT WITH THE UNITED STATES CONSTITUTION, IT DOES NOT VIOLATE ANY TREATIES OR ACTS OF CONGRESS BY WHICH LOUISIANA WAS ADMITTED TO THE UNION

While acknowledging that the right to a civil jury trial is not a fundamental right mandated in state courts by the United States Constitution, petitioner argues before this Court that Louisiana state courts are uniquely bound above all other states to provide that right for all civil litigants. In support of this proposition, petitioner cites the Treaty of Cession whereby Louisiana became part of the territory of the United States, and subsequent Acts of Congress pursuant to which Louisiana was admitted as a state to the Union. This argument is flawed because these documents only required Louisiana to adopt a state constitution which was "not inconsistent" with the federal Constitution. Petitioner's tautology collapses because if the federal Constitution does not grant civil trial by jury in state courts, *a fortiori*, the provision in the Louisiana constitution for appellate review of fact in state courts is certainly consistent with the federal Constitution. Although designed to circumvent an intrinsic constitutional deficiency, petitioner's argument fails to raise any new issues not previously decided by this Court because it turns, fundamentally, on a purely constitutional analysis.

The Treaty of Cession of Louisiana between the Republic of France and the United States of America was signed on April 30, 1803, and ratified on October 21, 1803. The Treaty was originally drafted in French, and was executed in both English and French. Article III of the Treaty stated:

> ARTICLE III.
>
> Les habitants des territoires cédés seront incorporés dans l'union des Etats-Unis, et admis, aussitot qu'il

> sera possible, d'aprés les principes de la constitution fédérale á la jouissance de tous les droits, avantages et immunités des citoyens des Etats-Unis, et en attendant, ils seront maintenues et protégés dans le jouissance de leurs libertés, proprietés, et dans l'exercice des religions qu'ils professent.[1]

In creatively recasting the previously rejected contention that Louisiana state courts are constitutionally bound to provide civil trial by jury without appellate review of fact, petitioner argues that Louisiana's constitutional scheme violates Article III of the Treaty of Cession. On its face, however, Article III merely establishes that the federal government was to place citizens of the ceded territory on "equal footing" with all other citizens of the United States of America. A reading of the Treaty of Cession 186 years after its ratification to mean that its provisions bound the not-yet-admitted State of Louisiana to guarantee forever the right to a traditional common law jury trial in state civil proceedings is tantamount to placing Louisiana's inhabitants on an altogether different, rather than equal, footing with the citizens of other states. The Bill of Rights guaranteed United States citizens civil jury trial only in the nation's federal courts, and this Court confirmed in pre-Fourteenth Amendment cases that the right was not constitutionally imposed upon the courts of the several states. The subsequent enactment of the Fourteenth Amendment and the evolution of due process requirements provided a clear opportunity for this Court to hold the Seventh Amendment applicable to state courts, but it has consistently refused to do so.

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[1] The English version of the Article reads as follows: "The inhabitants of the ceded territory shall be incorporated in the union of the United States, and admitted as soon as possible, according to the principles of the federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." (Petitioner's App. at 27a).

Petitioner has cited decisions of this Court discussing the common law prohibition against appellate re-examination of factfindings by a jury under the Seventh Amendment. Petition at 14-15. These cases are simply inapposite in the context of civil proceedings in Louisiana state courts. In *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1912), this Court defined the question before it as "the power of a Federal court to re-examine, otherwise than according to the rules of the common law, issues of fact which have been determined by the verdict of a jury . . ." 228 U.S. at 395. The right of a state to modify civil trial by jury in its courts by allowing appellate review of fact was not considered, or in doubt, in *Slocum* given this Court's earlier holding in *Walker v. Sauvinet*, *supra*, that the Seventh Amendment is not binding on state courts.

Petitioner's argument faces an additional hurdle in that, although the treaty making power of the President and Senate under Article II of the Constitution extends to all proper subjects of negotiation, it does not include any matters which "do not essentially affect the actions of nations in relation to international affairs, but are purely internal." Hearings on S. J. Res. 1, before a subcommittee of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. 183 (1955) (Testimony of Secretary of State Dulles.), cited in Nowak, Rotunda & Young, *Constitutional Law* at 37 (3d ed. 1986). *See also*, *Geofroy v. Riggs*, 133 U.S. 258, 266-67 (1890). This inherent limitation on the federal government's treaty making power undercuts petitioner's logic in hindsight. The Cession Treaty was never intended by the governments of France and the United States as the specific mandate concerning Louisiana's judicial and constitutional scheme that petitioner would presently have the Court believe.

Throughout its history, the State of Louisiana has enacted constitutions which are consistent with the federal

Constitution, and has ensured that all of its citizens enjoy the "rights, advantages and immunities" accorded to all citizens of the United States. The Governments of the United States and the State of Louisiana have fully complied with the 1803 Treaty of Cession, and petitioner's strained interpretation of this Article as a basis for invalidating Louisiana's scheme of appellate review and over 100 years of jurisprudence is misguided.

Subsequent legislative history pertaining to Louisiana's admission into the Union further confirms the limited and specific nature of the protections established by Congress on behalf of the citizens of Louisiana, and Louisiana's full compliance with the relevant statutes. Following the Treaty of 1803, the Province of Louisiana was divided into two territories, including the territory of Orleans, which ultimately became the State of Louisiana as admitted in 1812. Once the governmental infrastructure of the territory of Orleans was established, Congress passed the "Enabling Act", Act of Congress, February 20, 1811, which was entitled as follows:

> Chap. XXI—An Act to enable the people of the territory of Orleans to form a constitutional state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes.

Respondent's App. at 1a.

Although Congress was committed to granting Louisiana's admittance on "equal footing" with the other states, the Enabling Act further directed that Louisiana's citizens "are hereby authorized to form for themselves a constitution and state government, and to assume such name as they may deem proper, under the provisions upon the conditions hereinafter mentioned."

Petitioner has noted that certain parameters were established for the constitution to be formed by the citizens of the Louisiana territory prior to statehood. Although

petitioner's brief before the Louisiana Supreme Court quoted the full pertinent provision, its brief before this Court omits a key phrase from this portion of the statute:

> Provided, the constitution to be formed, in virtue of the authority herein given, shall be republican, and consistent with the Constitution of the United States; *that it shall contain the fundamental principles of civil and religious liberty; that it shall secure the citizen a trial by jury in all criminal cases, and the privilege of the writ of habeas corpus conformably to the provisions of the Constitution of the United States* . . . (Emphasis added.) (Respondent's App. at 1a).

When read in context, it is clear that these legislative requirements for Louisiana's admission parallel those of the 1803 Treaty of Cession. Louisiana's citizens were to be placed on "equal footing" and enjoy constitutionally guaranteed rights in the same manner as they were enjoyed by all other citizens of the nation. There is no basis whatsoever to expand that congressional mandate to encompass rights which other citizens of the nation did not enjoy, including a completely unfettered right to a civil jury trial in state court.

This Act of Congress pursuant to which Louisiana became one of the United States of America focused on religious and civil liberties essential to a democracy, and specifically required strict conformity with the federal Constitution only with respect to the guarantee of trial by jury in criminal cases. The limitation of the Enabling Act's reference to criminal trial by jury fatally pierces petitioner's argument that subsequent Louisiana constitutional enactments violated the supreme law of the nation.[2] The Enabling Act provided a framework for

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[2] In petitioner's brief, reference is made to Acts of Congress prior to the Enabling Act concerning the judicial system which was established on an interim basis between the Treaty of 1803 and the Enabling Act. The more explicit requirements of the Enabling

Louisiana to gain admission as a state, and for protecting certain fundamental rights and liberties enjoyed by all other United States citizens. The Act should not be read as imposing a specific limitation on the State of Louisiana's right to establish a judicial system of its own design which fully comported with the federal Constitution.

Pursuant to the Enabling Act, a Louisiana constitutional convention was called and the Louisiana Constitution of 1812 resulted. Article IV of the 1812 constitution spoke to the creation of a state court judicial system, and included no specific provisions with respect to appellate review of fact in civil cases by the Supreme Court, which was the only appellate court at that time. Respondent's App. at 1a. Article IV did include, however, a critical section designed to preserve Louisiana's civil law tradition intact unless or until the legislature altered a rule of law on a specific issue-by-issue basis:

> The existing laws in this territory, when this constitution goes into effect, shall continue to be enforced until altered or abolished by the Legislature; Provided however, that the Legislature shall never adopt any system or code of laws, by a general reference to the said system or code, but in all cases, shall specify the several provisions of the laws it may enact.
>
> Article IV, Section 11 of the Louisiana Constitution of 1812.

The State of Louisiana did adopt the common law criminal system, including the right to trial by jury in criminal prosecutions, in Article VI, Section 18 of the Constitution of 1812, in accordance with the express directive of the Enabling Act.

Act as the basis for Louisiana's admission as a state represent the latest expression of the sovereign will, and therefore control. *See, Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889).

Thus, although trial by jury in civil cases was adopted in the Practice Act of 1805 by the first session of the legislative council of the Territory of Orleans, the Louisiana Constitution of 1812 did not mandate civil trial by jury, and expressly preserved Louisiana's civil law practices and procedures which traditionally included appellate review of fact. As noted in petitioner's brief, by Act of Congress dated April 8, 1812, Congress approved the Louisiana Constitution of 1812 and incorporated Louisiana in the Union on the basis of that approval. Congress approved the Constitution of 1812 for one simple reason: it fully complied with the mandate previously set forth in the Enabling Act in that it was "not inconsistent" with the terms of the United States Constitution.

Petitioner implies that Congress approved the Constitution of 1812 unaware of an alleged inconsistency because there was no specific reference in that document to appellate review of fact. In fact, Congressional approval of the 1812 constitution and Louisiana's subsequent admission indicates that, although the 1812 Constitution clearly did not guarantee civil trial by jury in terms similar to the Seventh Amendment to the federal Constitution, or certain other provisions incorporated in the Bill of Rights, Congress nonetheless approved the Louisiana constitution because it was not inconsistent with the United States Constitution. Congress was well aware that Louisiana's juridical roots lay in the civil law of continental Europe, and that the 1812 constitution preserved certain legal principles and practices which were different from the common law practiced by the other states. In sum, the Congressional mandate set forth in the Enabling Act was fully complied with, and Congress verified that fact prior to admitting Louisiana as a state in 1812.

Early decisions by this Court similarly recognized that Louisiana's civil law practices and procedures were distinctly different from the common law practice in other

states of the nation. These cases arose as a result of congressional legislation in 1824 which provided that Louisiana federal courts would be governed by state law procedure, with federal district court judges being granted limited authority to modify those procedures to accommodate discrepancies with common law practice. In *Parsons v. Bedford*, 28 U.S. 433 (1830), the Court held that, notwithstanding the Act of Congress of May 26, 1824, Louisiana federal courts were constitutionally prohibited from granting a new trial to reconsider a jury's findings of fact. Subsequently, in *Livingston v. Story*, 34 U.S. (9 Pet.) 632 (1835), the Court held that Louisiana federal courts exercise equity jurisdiction in accordance with other United States courts pursuant to Article III of the U.S. Constitution, even though the distinction between actions at law and equity was unknown in Louisiana state court procedure. Although these decisions mainly clarify the limited role that Louisiana civil law procedure would play in federal courts within the state, they also highlight this Court's awareness, and that of Congress, that Louisiana was free to practice and adhere to civilian procedure in state court actions.

Early decisions of the Louisiana Supreme Court confirmed that appellate courts could review the evidence considered at the trial court level, and modify or reverse a civil jury's verdict. *Abat v. Doliole*, 4 Mart. (O.S.) 136 (1816). Although under the terms of the Code of Practice of 1805, as well as all subsequent versions of the code, the right to a jury trial was absolute on the timely request of either party to the action, the right was judically and legislatively modified to encompass appellate review of fact in accordance with traditional civil law procedure.[3] As noted by Judge John Minor Wisdom on

[3] Concerning the scope of appellate review, Article 2164 of the Louisiana Code of Civil Procedure currently provides:

> The Appellate Court shall render any judgment which is just, legal, and proper upon the record on appeal.

behalf of the three-judge panel in *Melancon v. McKeithen*, 345 F.Supp. 1025, (E.D. La. 1972), *aff'd* 409 U.S. 943 and 1098 (1972), the civil law in Louisiana has always fused the concepts of "equity" and "common law" as they are recognized in Anglo-American jurisdictions. To that extent, prohibition of appellate review of the facts would tend to destroy this fusion. Because the state never had common law courts as distinguished from other courts, the federal Constitution's reference in the Seventh Amendment to "suits at common law", construed as the framers construed it, is meaningless in the Louisiana judicial system. *Melancon*, 345 F.Supp. at 1029.

Appellate review of fact in Louisiana was repeatedly confirmed by the Louisiana Supreme Court from 1820 onward,[4] and was impliedly confirmed in subsequent constitutions. H. McMahon, *The Louisiana Code of Civil Procedure*, 21 La. L. Rev. 1, 13 n.34 (1960). The Louisiana Constitution of 1845 provided for Supreme Court review "in criminal cases on questions of law alone, whenever the punishment of death or hard labor may be inflicted, or when a fine exceeding $300.00 is actually imposed." Louisiana Constitution of 1845, Article 63. Respondent's App. at 2a. Similarly, the constitutions of 1852 and 1864 provided that, although the Supreme Court's appellate jurisdiction in criminal matters was limited to legal questions, that was impliedly not the case in civil actions. Respondent's App. at 2a-3a.

The Constitution of 1879 explicitly stated that "appeal on the law and the fact" was directly from the court in

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[4] *See Martineau v. Hooper*, 8 Mart. (O.S.) 699 (1820); *Mitchel v. Jewel*, 10 Mart. (O.S.) 645 (1822); *Morris v. Hatch*, 2 Mart. (N.S.) 491 (1824). *See also Scott v. Turnbull*, 10 Mart. (O.S.) 335 (1821); *Dunn & Wife v. Duncan's Heirs*, 10 Mart. (O.S.) 671 (1822); *LaPointe v. Guidry*, 7 La. 246 (1834); *Montgomery v. Russell*, 10 La. 330 (1836); *Williams v. Lanier*, 14 La. 210 (1839); *Hood v. McCorkle*, 16 La. 240 (1840); *Nott & Co. v. Kirkman*, 19 La. 14 (1841).

which the case originated to the Supreme Court, the only appellate court at that time, and "in criminal cases, on questions of law alone." Respondent's App. at 3a. Subsequent Louisiana constitutions established the state appellate court structure, and expressly provided for review of law and fact in civil cases, for both the Supreme Court and courts of appeal. *See* Louisiana Constitution of 1898, Arts. 85, 98 [As amended Acts 1906, No. 137, adopted Nov. 6, 1906] Respondent's App. at 3a; Louisiana Constitution of 1913, Arts. 85, 98 Respondent's App. at 4a; Louisiana Constitution of 1921, Art. VII, §§ 10, 29 Respondent's App. at 4a; Louisiana Constitution of 1974, Art. 5, §§ 5(e), 10(B). Respondent's App. at 5a. Moreover, Louisiana's constitutional protection of this cornerstone of civil law procedure in state courts reflects the will of a majority of Louisiana's citizens. An initiative during the state's 1974 constitutional convention to rescind the authority of appellate courts to review factual findings failed. Transcript of Constitutional Convention, Vol. IX, 30th Day, pp. 61-73), cited in *Gonzales v. Xerox Corp., supra.*

The scheme of appellate review of law and fact in Louisiana embodies a procedural compromise which has evolved, legislatively and judicially, to accommodate Louisiana's civil law traditions and Anglo-American concepts of due process. *Melancon*, 345 F.Supp. at 1047. Contrary to petitioner's argument that appellate review of fact in Louisiana state courts renders civil trial by jury in Louisiana a "futile exercise", the process has simply been modified to balance principles of justice and legitimate concerns about judicial economy and efficiency. Although petitioner might disagree with the system as it works in this case, as long as the State of Louisiana has effected civil procedures which are consistent with the federal Constitution, the relevant inquiry is answered. Appellate review of fact is the majority's mandate to alter traditional civil trial by jury as it is known under

the common law, and is neither unconstitutional nor unlawful.

Petitioner's portrayal of Louisiana as a state that has violated the terms by which it was admitted to the Union is really a veiled attempt to overturn the right of its citizens to provide for meaningful trial by jury as they see fit. Petitioner's brief suggests that this case presents an opportunity for the Court to secure what citizens of the state of Louisiana "have been seeking unsuccessfully to secure" ever since its admittance into the Union. The truth is that Louisiana's citizens have received everything they are entitled to, and more, including a sensible mechanism for ensuring fair and efficient civil jury trials in accordance with the civil law procedures which they have enacted for themselves.

Judge Wisdom's thoughtful analysis in *Melancon* correctly points out that Louisiana is not the only jurisdiction to modify civil trial by jury as it existed when the Bill of Rights was enacted. Many states no longer require a civil jury to be unanimous in its verdict, and the majority of states have legislatively authorized civil juries of less than the traditional 12 jurors in the common law. 345 F.Supp. at 1042. Even in federal courts where the Seventh Amendment is applicable, parties may stipulate to a reduced jury, or may even waive the right to a jury trial. *See* Rules 38 and 48, Fed. R. Civ. P. Even in criminal cases where the right to a jury trial is constitutionally guaranteed in state courts, *see Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court has nonetheless approved juries of less than twelve. *Williams v. State of Florida*, 399 U.S. 78 (1970). Certain crimes, collectively referred to as "petty" offenses, do not require jury trial at all despite this Court's holding that a jury trial in criminal cases is required by due process. The significance of these modifications in jury trials was summarized by Judge Wisdom as follows:

> These examples from the criminal area demonstrate that a right considered 'fundamental' may be modified or abolished altogether. Even if we were to decide that the right to a jury trial in civil cases is a requirement of due process, the Louisiana modification of that alleged right would not necessarily be constitutionally impermissible. The Louisiana statutes challenged here cannot be considered 'unreasonable or arbitrary', in the light of the historical origin and line of development of the cases involving the right to a jury. *Hardware Dealers Mutual Fire Ins. Co. of Wisconsin v. Glidden Company,* 284 U.S. 151 (1931).
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> 345 F.Supp. at 1043-44.

The decision of the three judge panel for which Judge Wisdom was speaking went on to expressly hold that, even assuming a civil jury trial in state court was constitutionally required, the Louisiana scheme does not destroy that right, "but modifies it in accordance with fair procedures many of which are analogous to procedures established in the Federal Rules of Civil Procedure." 345 F.Supp. at 1045. That reasoning is as true today as it was at the time of the *Melancon* decision. Although petitioner urges that the appellate court's reversal of the jury's verdict in this case demonstrates a complete disintegration of that right in Louisiana, the relevant inquiry of whether the system as a whole is lawful, constitutional, and indeed fundamentally fair, must be answered in the affirmative.[5]

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[5] The evolution of trial by jury in jurisdictions other than Louisiana raises an important practical question concerning the scope of petitioner's argument. If, as petitioner alleges, appellate review of fact in Louisiana abrogates the right to a civil trial by jury as required by federal treaty and legislation, petitioner's argument implies that Louisiana must preserve that right as it existed in common law jurisdictions when Louisiana was admitted to the Union. Theoretically, Louisiana would be uniquely unable to modify its procedures in accordance with the changes in civil jury trials enacted by other jurisdictions. It is unclear under petitioner's logic,

III. THE COURT OF APPEALS' DECISION TO REVERSE THE JURY VERDICT IN THIS CASE WAS IN ACCORDANCE WITH LOUISIANA STATE LAW GUIDELINES CONCERNING APPELLATE REVIEW OF FACT

Petitioner further urges that the appellate court ran roughshod over the checks and balances judicially imposed on the power of a Louisiana appeals court to review a trial court's findings of fact, particularly the "manifest error" doctrine. Although Louisiana is not bound by the federal Constitution, treaty or statute to provide civil jury trials in state courts, petitioner argues that the judicially self-created constraints imposed upon Louisiana appellate courts were effectively ignored in this case because the appeals court saw fit to reverse and render a judgment based upon the factual record before it. This argument, asserted as the second question presented to this Court and as petitioner's fourth assignment of error to the Supreme Court of Louisiana, raises purely state law issues which were correctly passed upon by that tribunal, and is simply without foundation.

Closely interwoven with the "manifest error" limitation upon appellate fact review in Louisiana is the principal that an appeals court should verify that a jury's verdict was based upon correct application of the law to the facts. Jury instructions which are fundamentally incorrect or insufficiently clear with respect to a crucial issue directly effect whether individual justice has resulted in a particular case, because a jury's verdict must reflect correct application of general rules of law to the particular facts at issue. The Louisiana jurisprudence

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whether Louisiana would be required to provide juries composed of 12 jurors in civil cases and subject to a requirement of unanimous verdict. Although petitioner paints the scheme of appellate review in Louisiana as an aberrational threat to civil jury trials, petitioner's argument, when taken to its logical extreme, would require Louisiana to stand uniquely frozen in time, contrary even to the common law jurisdictions in this nation and England.

has correctly established that when jury instructions are fundamentally lacking or incorrect, an appellate court with a complete record before it should review the facts and render a decision. *Gonzales v. Xerox Corp.*, 320 So.2d 163 (La. 1975).

Because the Louisiana Constitution and the Civil Code expressly extend appellate court jurisdiction in civil cases to fact and law, Louisiana courts are properly empowered to review, and if necessary to reverse, findings of fact previously considered against the backdrop of incorrect or inadequate jury instructions. As the Court of Appeals in this case noted, "adequate jury instructions are those that fairly and reasonably point out the issues and provide correct principles of law for the jury to apply to those issues." (Citation omitted). Petitioner's App. at 8a. Thus, although the adequacy of jury instructions is conceptually distinct from the "manifest error" analysis of a Louisiana appeals court, these doctrines are interrelated and have evolved to accommodate the sanctity of the findings at the trial court level, fairness principles and judicial economy.

Although the Louisiana Court of Appeals found that the jury instructions in this case were inadequate because they did not clearly point out the issues and provide correct principles of law for the jury to apply, the court's reversal of the jury verdict was also expressly based upon the "manifest error" standard. After conducting its *de novo* review of the evidence, the court explicitly noted that the "manifest error" threshold had been crossed in this case:

> Given the overwhelming nature of the evidence even under the standard of manifest error, we would be constrained to hold the verdict plainly wrong. And given the inadequacy of the jury instructions, we conclude *a fortiori* that the evidence preponderated to show that Doug Fuller was an employee of Joe Bob White.

Petitioner's App. at 25a.

The jury instruction which the Louisiana Court of Appeals found to be inadequate went to the most crucial distinction in this case between employee and independent contractor status. The appellate court correctly held that the legal framework against which the jury viewed the evidence was impermissibly unclear and incorrect, and given that fact and the overwhelming evidence against the verdict, that the jury's findings of fact on that point were manifestly erroneous. Credibility of testimony requiring firsthand view of witnesses was not at issue, and the Louisiana Court of Appeals' decision was fully supported by a complete record. The Louisiana Supreme Court was satisfied that the Court of Appeals' decision in these circumstances was a completely proper exercise of an appellate court's constitutional and legislative authority under Louisiana law, and the decision by the Louisiana Court of Appeals raises no questions to which a writ from this Court should be directed.

CONCLUSION

Petitioner has failed to articulate any cognizable basis for invalidating Louisiana's constitutional scheme of appellate review of law and fact, and over one hundred years of jurisprudence decided in accordance with that scheme. This Court has consistently upheld the right of Louisiana citizens to preserve their civil law traditions and practices in state court proceedings. The Louisiana constitution, both in its earliest and present forms, is fully consistent with the federal Constitution, and therefore comports with all United States treaties and Acts of Congress by which Louisiana gained statehood.

Because petitioner's application merely reconstructs arguments previously rejected by this Honorable Court, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

ACTS OF CONGRESS AUTHORIZING ADMISSION OF STATE OF LOUISIANA

Enabling Act,
Act of Congress, February 20, 1811

Chap. XXI—An Act to enable the people of the territory of Orleans to form a constitutional state government, and for the admission of such state into the Union, on an equal footing with the original states, and for other purposes.

* * * *

Provided, the constitution to be formed, in virtue of the authority herein given, shall be republican, and consistent with the Constitution of the United States; that it shall contain the fundamental principles of civil and religious liberty; that it shall secure the citizen a trial by jury in all criminal cases, and the privilege of the writ of habeas corpus conformably to the provisions of the Constitution of the United States . . .

CONSTITUTIONS OF THE STATE OF LOUISIANA

Constitution of 1812

Article IV

CONCERNING THE JUDICIARY DEPARTMENT

§ 11. The existing laws in this territory, when this constituion goes into effect, shall continue to be enforced until altered or abolished by the Legislature; provided however, that the Legislature shall never adopt any system or code of laws, by a general reference to the said system or code, but in all cases, shall specify the several provisions of the laws it may enact.

Article VI

§ 11. In all criminal prosecutions, the accused has the right of being heard by himself or counsel, of demanding

the nature and cause of the accusation against him, of meeting the witnesses face to face, of having compulsory process for obtaining witnesses in his favor, and prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage, nor shall he be compelled to give evidence against himself.

Constitution of 1845

Art. 63. The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction, which jurisdiction shall extend to all cases where the matter in dispute shall exceed $300.00 . . . and in criminal cases on questions of law alone, whenever the punishment of death or hard labor may be inflicted, or when a fine exceeding $300.00 is actually imposed.

Constitution of 1852

TITLE V

JUDICIARY DEPARTMENT

Art. 62. The Supreme Court, except in cases hereinafter provided, shall appellate jurisdiction only . . . and to all criminal cases on questions of law alone, . . . The legislature shall have power to restrict the jurisdiction of the Supreme Court in civil cases to questions of law only.

Constitution of 1864

TITLE V

JUDICIARY DEPARTMENT

Art. 70. The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction only . . . and to all criminal cases on questions of law alone. . . .

Constitution of 1868

TITLE IV

JUDICIARY DEPARTMENT

Art. 74. The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction only . . . and in such cases the appeal shall be direct from the court in which the case originated to the Supreme Court; and in criminal cases, on questions of law only. . . .

Constitution of 1879

JUDICIARY DEPARTMENT

Art. 81. The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases when the matter in dispute, or the fund to be distributed, whatever may be the amount therein claimed, shall exceed $2,000.00, exclusive of interest . . . and in such cases the appeal on the law and the fact shall be directly from the court in which the case originated to the Supreme Court; and to criminal cases, on questions of law only. . . .

Constitution of 1898

Art. 85. The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction only . . . and in such cases the appeal on the law and the fact shall be directly from the court in which the case originated to the Supreme Court; and to criminal cases, on questions of law alone. . . .

Art. 98. [As amended Acts 1906, No. 137, adopted Nov. 6, 1906]. The Courts of Appeal, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases, civil and probate, when the matter in dispute of the fund to be distributed shall exceed one hundred dollars, exclusive of interest, and shall not exceed two thousand dol-

lars, exclusive of interest, and such appeal shall be upon the law and the facts.

Constitution of 1913

Art. 85. The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction only . . . and in such cases the appeal on the law and the fact shall be directly from the court in which the cases originated to the Supreme Court; and to criminal cases, on questions of law only . . . .

Art. 98. The Courts of Appeals, except as otherwise provided in this Constitution, shall have appellate jurisdiction only . . . and all appeals shall be both upon the law and the facts.

Constitution of 1921

JURISDICTION

§ 10. Supervisory, Original and Appellate Jurisdiction

§ 10. The Supreme Court has control of, and general supervisory jurisdiction over all inferior courts.

* * * *

In civil cases, its appellate jurisdiction extends to both the law and the facts. In criminal matters, its appellate jurisdiction extends to questions of law only.

§ 29. Appellate and Supervisory Jurisdiction

* * * *

All appeals of which the Courts of Appeal have appellate jurisdiction as provided in this section shall be on both the law and the facts, except where the appeal is limited to questions of law only by any other section of this Constitution.

Constitution of 1974

§ 5. Supreme Court; Jurisdiction; Rule-Making Power; Assignment of Judges

See (Scope of Review). Except as otherwise provided by this Constitution, the jurisdiction of the Supreme Court in civil cases extends to both law and facts. In criminal matters, its appellate jurisdiction extends only to questions of law.

§ 10. Courts of Appeal; Jurisdiction

§ 10. The scope of review, except as limited to questions of law by this Constitution, or is provided by law on the review of administrative agency determination, appellate jurisdiction of a court of appeal extends to law and facts.

Louisiana Civil Code

Art. 2164. The Appellate Court shall render any judgment which is just, legal, and proper upon the record on appeal.

CONSTITUTION OF THE UNITED STATES

Art. II; § 2. Powers of the President

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . .